Waste Stream Management, Inc. and its wholly owned subsidiary CBI Steel, Inc. *and* Teamsters Local Union No. 687, International Brotherhood of Teamsters, AFL–CIO.[1] Cases 3–CA–16245 and 3–RC–9695

December 22, 1994

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

The administrative law judge in this case has found that the Respondent committed numerous violations of Section 8(a)(3) and (1) of the Act during the first 4 months of 1991 and that it interfered with employee free choice in a representation election held on April 5, 1991.[2] The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions,[4] as modified below, and to adopt the recommended Order, as modified.

I. AGENCY STATUS OF WILLIAM HENRY

The judge found that the Respondent violated Section 8(a)(1) of the Act, and engaged in objectionable preelection conduct, when William Henry solicited employee signatures on an antiunion petition. According to the judge, Henry was a nonsupervisory employee who had actual and apparent authority from management to engage in such activity on the Respondent's behalf. In so finding, the judge relied on several evidentiary factors, including: Henry's continued petition activity after he became a full-time, nonsupervisory assistant to admitted Supervisor Michael Bisnett in mid-March 1991; the credible testimony of employee Mark Rood indicating his impression that management would know if he signed Henry's petition; and the credible testimony of employee Verde Snyder that Henry used a computer printout which the administrative law judge inferred must have been provided by the Respondent to assist Henry's solicitation efforts.

We agree with the judge that Henry acted as the Respondent's agent, but we do not rely on the factors enumerated above. Although Henry's full-time performance of duties as Bisnett's assistant would support an agency finding, there is no affirmative evidence that he solicited signatures for the antiunion petition after he assumed these duties. Rood's testimony indicates only a subjective belief which, even if correct, does not itself prove Henry's agency. Finally, there is insufficient evidence about the nature or origin of the computer printout to warrant the inference that the Respondent must have provided it to Henry to facilitate the petition drive. We nevertheless agree with the judge, for the other reasons fully described in his decision, that Henry acted as the Respondent's agent in the unlawful solicitation of signatures for the antiunion petition.

II. IMPRESSION OF SURVEILLANCE

The judge also referred to several factors in support of his finding that the Respondent violated Section 8(a)(1) of the Act by creating the impression that its employees' union activities were under surveillance. One of those factors was Rood's aforementioned testimony about his subjective impression of surveillance. We do not rely on this evidence. Another factor was employee Harold Bush's testimony about an occasion in late March or early April when supervisor Bisnett repeatedly said to him, ''Yoo hoo, Harold, I'm watching you.'' We likewise do not rely on this factor as proof of the alleged unfair labor practice because the record does not provide a sufficient context for Bisnett's statements to warrant the inference that they were related to employees' union activities. The remaining factors cited by the judge fully support his finding of unlawful conduct.

III. DISCHARGE OF ROBERT MONROE

The judge found, and we agree, that the Respondent violated Section 8(a)(1) of the Act by terminating driver Robert Monroe and redistributing his route to drivers Michael Miller and Robert Perry. We do not rely,

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[1] The name of the Charging Party has been changed to reflect the new official name of the International Union.

[2] On November 3, 1993, Administrative Law Judge Jesse Kleiman issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs. The Charging Party filed an answering brief to the Respondent's exceptions. The Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent contends, inter alia, that the judge's conduct of the hearing and his findings have been tainted with bias, hostility, and prejudice against the Respondent. We find these allegations to be without merit. On our full review of the record and the decision of the judge, we perceived no evidence that he prejudged the case, made prejudicial rulings, or demonstrated bias, hostility, or prejudice against the Respondent's counsel or their witnesses. We further find no evidence of partiality in the judge's analysis and discussion of the evidence in his findings.

[4] In adopting the judge's conclusion that supervisor Whitton's interrogation of employees Guiles, Law, and Prashaw violated Sec. 8(a)(1), Chairman Gould finds it unnecessary to rely on the holding in *Rossmore House*, 269 NLRB 1176 (1984), affd. 760 F.2d 1006 (9th Cir. 1985).

however, on the judge's use of the *Wright Line*[5] test of discriminatory motivation or on his use of the ''small plant doctrine'' to infer prior knowledge of Monroe's union activity. The theory of violation alleged here does not require proof of discrimination aimed at the discharged employee or of knowledge that the discharged employee engaged in protected concerted activity. Instead, the legal question presented is whether the Respondent's conduct would reasonably tend to interfere with, threaten, or coerce employees in the exercise of their rights under Section 7 of the Act.

In this regard, the Respondent's discharge of Monroe and its redistribution of his route to Miller and Perry in March 1991 closely resembles an unlawful action undertaken by the Respondent 2 months earlier when it permanently laid off employee Eugene Prashaw and redistributed his route to employees Impanel Guiles and Edward Law.[6] In both instances, the route redistribution represented a substantial benefit to a pair of employees who, prior to the advent of the Union, had repeatedly made unavailing complaints about having to perform part of the work of a third employee whom the Respondent ultimately terminated. In both instances, particularly in light of the Respondent's other unfair labor practices, employees would reasonably tend to view the discharge and route redistribution action as an attempt by the Respondent to redress previously ignored grievances and to confer benefits in order to dissuade employees from supporting the Union. The Respondent has not proved a legitimate and substantial business justification for its conduct. Accordingly, such conduct violates Section 8(a)(1) of the Act.[7]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Waste Stream Management, Inc. and its wholly owned subsidiary, CBI Steel, Inc., Potsdam, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified by substituting the attached notice for that of the administrative law judge.[8]

[Direction of Second Election omitted from publication.]

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of those protected concerted activities.

WE WILL NOT interrogate our employees concerning their union activities and the union activities of other employees.

WE WILL NOT solicit grievances from our employees with explicit and implicit promises to rectify them.

WE WILL NOT suggest to our employees that they could draw up a petition against Teamsters Local Union No. 687, International Brotherhood of Teamsters, AFL–CIO, or any other labor organization and solicit them to sign such a petition

WE WILL NOT inform our employees that if the Union lost the election we would set up a grievance procedure.

WE WILL NOT promise employees various benefits including a grievance procedure in order to induce them to vote against the Union in any upcoming election.

WE WILL NOT create the impression that we are keeping under surveillance the activities of our employees on behalf of the Union or any other labor organization.

WE WILL NOT promise and grant wage increases to our employees in order to dissuade them from supporting the Union.

WE WILL NOT terminate employees and consolidate routes in order to redress grievances of our employees and dissuade them from engaging in activities on behalf of the Union or any other labor organization.

WE WILL NOT tell our employees that they are being assigned more onerous working conditions or that we are seeking a reason to terminate them because of their activities on behalf of the Union or any other labor organization, and that they should forego such activities.

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[5] See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981).

[6] Indeed, Respondent on brief relies on the ''Results from laying off Prashaw and splitting up his route.''

[7] We agree with the judge, for the reasons stated in his decision, that the preponderance of the evidence also supports finding that the Respondent permanently laid off Prashaw because of his union activities, in violation of Sec. 8(a)(3) of the Act.

[8] The General Counsel has excepted to the judge's apparently inadvertent omission of reinstatement language in his recommended notice. We shall substitute a notice which includes the appropriate remedial language.

WE WILL NOT threaten to close our facilities because of the union activities of our employees and if the Union came in.

WE WILL NOT inform our employees that they are being fired or were fired because of their activities on behalf of the Union or any other labor organization.

WE WILL NOT impose more onerous working conditions on our employees because they joined, supported, or assisted the Union or any other labor organization, and engaged in concerted activities for the purpose of collective bargaining or mutual aid or protection, and in order to discourage employees from engaging in such activities or other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

WE WILL NOT terminate employees or otherwise discriminate against them in regard to hire or tenure of employment or any term or condition thereof because they engage in activities on behalf of the Union or any other labor organization, or in order to discourage union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL offer Eugene Prashaw, Verde Snyder, Richard Walrath, Mark Rood, Vern Arno, and Robert Monroe immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and WE WILL make them whole for any loss of earnings they may have suffered because of their terminations together with interest.

WE WILL remove from our personnel records any and all references to the terminations of the above named employees, and WE WILL notify each of them, in writing, that this has been done, and that evidence thereof will not be used against them in any way.

WASTE STREAM MANAGEMENT, INC.
AND ITS WHOLLY OWNED SUBSIDIARY
CBI STEEL, INC.

Thomas J. Sheridan, Esq. and *Robert A. Ellison, Esq.*, for the General Counsel.

Daniel S. Cohen, Esq. (Evans, Bankert, Cohen, Lutz & Panzone, Esqs.), for the Respondent.

Christy Concannon, Esq. (Baptiste & Wilder, P.C.), for the Charging Party.

DECISION

STATEMENT OF THE CASE

JESSE KLEIMAN, Administrative Law Judge. On the basis of a charge and amended charge filed on April 11 and May 21, 1991, respectively, in Case 3–CA–16245 by the Teamsters Local Union No. 687, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO (Charging Party or the Union), the General Counsel of the National Labor Relations Board, by the Regional Director for Region 3, Buffalo, New York, duly issued a complaint and notice of hearing on June 26, 1991, against Waste Stream Management, Inc. and its wholly owned subsidiary CBI Steel, Inc. (the Respondent or the Employer), alleging that the Respondent had engaged in certain unfair labor practices within the meaning of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). By answer dated July 1, 1991, duly filed with the Board, the Respondent denied the material allegations in the complaint.

Previously, on February 4, 1991, the Union filed a petition for certification of representative with the Board in Case 3–RC–9695 seeking an election among the Respondent's employees in an appropriate unit. Pursuant to a Stipulated Election Agreement approved by the Regional Director for Region 3 on March 1, 1991, an election by secret ballot was conducted on April 5, 1991 among the employees in the following described appropriate collective-bargaining unit:

> All full-time and regular part-time employees including all truck drivers, yard people, recyclers, mechanics, steel fabricators, equipment operators and plant clericals employed by Waste Stream Management, Inc. and its wholly owned subsidiary CBI Steel, Inc. at their facilities located at Potsdam, Canton, Gouverneur, Ogdensburg and Parishville, New York. Excluding all office clerical employees and guards and supervisors as defined in the Act.

The official tally of ballots showed that 14 votes were cast in favor of the Union, 36 votes against the Union, and 10 ballots were challenged. On April 11, 1991, the Union filed timely objections to the election alleging that the Respondent had engaged in a wide range of unlawful conduct affecting the outcome of the election. By letter dated June 26, 1991, the Union requested withdrawal of Objections 3 and 4. The remaining Objections 1, 2, 5, 6, and 7 assert, in substance, that the Respondent unlawfully discharged ''at least four union supporters,'' unlawfully interrogated employees about their union sympathies and how they were going to vote in the election, engaged in unlawful surveillance of employee's union activities, promised employees better wages, benefits and working conditions to discourage support for the Union, and that ''During the critical period, the Employer engaged in other conduct that restrained, threatened and coerced employees in the exercise of rights guaranteed by Section 7 of the Act and which prevented a fair election.'' The withdrawal request was approved by the Regional Director for Region 3 on June 27, 1991.

Upon investigation of the remaining objections to the election and the related unfair labor practice charges filed by the Union, the Regional Director for Region 3 duly issued an order on June 27, 1991, directing a hearing on the objections, the consolidation of Cases 3–CA–16245 and 3–RC–9695 and a notice of hearing. Also, the Regional Director held that the unlawful conduct alleged to have been committed by the Respondent in the objections to the election and in the complaint, if it did occur, could be found to have interfered with the election and be considered in determining whether the election should be set aside, since such conduct was alleged to have happened during the critical period between the filing

of the petition in Case 3–RC–9695 and the election held therein on April 5, 1991.[1] The Regional Director then concluded that such allegations and the investigation thereof raise substantial and material questions of fact that can best be resolved by a formal hearing.

Moreover, as the Board held in *White Plains Lincoln Mercury*, 288 NLRB 1133, 1138 (1988):

> [W]hen the unlawful conduct is, a fortiori, conduct that interferes with a free choice in an election, it cannot be treated as somehow falling outside the legitimate and appropriate scope of the investigation of the election process simply because it was not cited in the specific objections to the election. In such circumstances it is appropriate to find that the employer's misconduct has impinged on the employees' exercise of free choice and then set the election aside.

During the course of his investigation of the objections to the election and the related unfair labor practice charges in Case 3–CA–16245, the Regional Director for Region 3 adduced evidence that during the critical period between the filing of the petition and the date of the election, the Employer solicited grievances from its employees with explicit and implicit promises to rectify them; suggested to its employes that they could draw up a petition against the Union; informed its employees that if the Union lost the election the Respondent would establish a grievance procedure; solicited its employees to sign a petition against the Union; promised and granted wage increases to dissuade the employees from supporting the Union; terminated the employment of employee Robert Monroe and consolidated routes in order to redress grievances of its employees and in order to dissuade employees from engaging in activities on behalf of the Union; told an employee that he was being assigned more onerous working conditions because of his activities on behalf of the Union; and told an employee that the Employer was seeking a reason to terminate him because of his activities on behalf of the Union and that the employee should forego such activities. The Respondent's conduct as alleged above was not specifically set forth in the Union's objections to the election.

In *American Safety Equipment Corp*., 234 NLRB 501 (1978), and *Dayton Tire & Rubber Co*., 234 NLRB 504 (1978), the Board restated and reaffirmed its ''longstanding policy which permits a Regional Director to set aside an election based on conduct which he has discovered during his investigation, even though that particular conduct had not been the subject of a specific objection.''[2] Additionally, the Board has held that a Regional Director lacks the discretion to ignore any evidence that shows that the election has been tainted which he uncovered during the investigation and that to do so would constitute reversible error.[3] Such conduct, therefore, if it did occur, could be found to have interfered with the election.[4]

A hearing in the consolidated cases was duly held before me in Canton and Albany, New York, on October 15, 16, 17, 18, and 22, 1991. Subsequent to the close of the hearing, the General Counsel, the Union and the Respondent filed briefs. In their brief, counsels for the General Counsel moved to correct the transcript of these proceedings which mostly include corrections to the spelling of various names. I therefore grant the motion to correct the transcript as set forth in their brief.

Upon the entire record and the briefs of the parties, and upon my observation of the witnesses, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The complaint alleges, the Respondent admits, and I find that at all times material herein, Waste Stream Management, Inc. and CBI Steel, Inc., have been affiliated business enterprises with common officers, ownership, directors, management, and supervision; have formulated and administered a common labor policy affecting employees of their operations; have shared common premises and facilities; have provided services for and made sales to each other; have interchanged personnel with each other; and have held themselves out to the public as single-integrated business enterprises. I also find that by virtue of the above, Waste Stream Management, Inc. and CBI Steel Inc. (collectively the Respondent) constitute a single-integrated business enterprise and a single employer within the meaning of the Act.

The Respondent, at all times material herein, is and has been a New York corporation with its principal place of business located at l45 Outer Maple Road, Potsdam, New York, and with facilities located at Potsdam, Canton, Gouverneur, Ogdensburg, and Parishville, New York (the Respondent's facilities), where it is engaged in the business of rubbish removal, recycling, and scrap metal reprocessing, respectively. In the course and conduct of its business operations during the preceding 12 months, those operations being representative of its operation at all times material herein, the Respondent receives gross revenues in excess of $50,000 from the sale and direct shipment of recycled or processed materials from its facilities located in the State of New York to customers located outside the State of New York. The complaint alleges, the Respondent admits, and I find that the Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The complaint further alleges, the Respondent admits, and I find that Chester G. Bisnett Sr. (president),[5] James Bruno (vice president), Edwin Ricker, (labor counselor), Michael Bisnett (manager), Lawrence Whitten (supervisor), Robert Dalton (service manager), and Terry Morehouse (dispatchman and scale master) are supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act. The complaint also alleged that William Henry (foreman) and Ned Potts (fabrication engineer) are supervisors and agents of the Respondent under the Act. The Respondent in its answer denied that Henry was a supervisor

[1] *Intercontinental Mfg. Co*., 167 NLRB 769 (1967).

[2] Also see *White Plains Lincoln Mercury*, supra at 1136; *General Signal Corp*., 234 NLRB 914 fn. 1 (1978).

[3] *Van Camp Seafood Co*., 243 NLRB 165 (1979).

[4] *White Plains Lincoln Mercury*, supra; *American Safety Equipment Corp*., supra; *Dayton Rubber & Tire Co*., supra.

[5] It is clear from the record evidence that complaint allegation ''V'' incorrectly lists Chester G. Bisnett, Sr. as Jr.

and agent of the Respondent, but admitted that Potts was such a supervisor and agent. However, at the hearing the Respondent sought to amend its answer to now deny that Potts is a supervisor and agent under the Act. A discussion of the status of Henry and Potts as supervisors and agents of the Respondent under the Act will be forthcoming later on in this decision where appropriate.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the Respondent admits, and I find that Teamsters Local Union No. 687, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

III. THE APPROPRIATE BARGAINING UNIT

The Stipulated Election Agreement provides, the parties do not dispute, and I find that the following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time employees including all truckdrivers, yard people, recyclers, mechanics, steel fabricators, equipment operators and plant clericals employed by Waste Stream Management, Inc. and its wholly owned subsidiary CBI Steel, Inc. at their facilities located at Potsdam, Canton, Gouverneur, Ogdensburg, and Parishville, New York. Excluding all office clerical employees and guards and supervisors as defined in the Act.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

The complaint alleges that the Respondent in January, February, March, and April 1991 interrogated its employees concerning their union activities and the union activities of other employees, solicited grievances from its employees with explicit and implicit promises to rectify them, suggested to its employees that they could draw up a petition against the Union, informed its employees that if the Union lost the election the Respondent would set up a grievance procedure, solicited its employees to sign a petition against the Union, promised its employees various benefits including a grievance procedure in order to induce them to vote against the Union in the upcoming election, created the impression that it was keeping under surveillance the union activities of its employees, promised and granted wage increases to its employees in order to dissuade them from supporting the Union, terminated the employment of Eugene Prashaw and Robert Monroe and consolidated routes in order to redress grievances of its employees and in order to dissuade employees from engaging in activities on behalf of the Union, told an employee that he was being assigned more onerous working conditions because of his activities on behalf of the Union, told an employee that the Respondent was seeking a reason to terminate him because of his activities on behalf of the Union and that this employee should forgo such activities, threatened to close its facilities because of the Union activities of its employees, told an employee not to talk to anyone about the Union, informed an employee that he was being discharged because of his activities on behalf of the Union, informed an employee that he was fired because of his union activities, imposed more onerous working conditions on its employee Verde Snyder, and terminated employees Eugene Prashaw, Verde Snyder, Richard Walrath, Mark Rood, and Vern Arno because these employees joined, supported, or assisted the Union and engaged in concerted activities for the purpose of collective bargaining or mutual aid or protection, and in order to discourage employees from engaging in such activities, in violation of Section 8(a)(1) and (3) of the Act. The Respondent denies these allegations.

A. *The Evidence*

The Union's organizational campaign at the Respondent's facility began in January 1991 with Union Organizer Michael Matthews speaking to employees and having them sign union authorization cards. Matthews testified that on or about January 8, 1991, he gave cards to employees Michael Miller and Robert Monroe with Monroe signing his card then and there and returning it to Matthews. In and around the same time Matthews and Union President Fred Carter met with Bryan Rose at Rose's home and Rose not only signed an authorization card but volunteered to obtain other employees signatures on authorization cards. On January l6, 1991, Matthews met with employees Eugene Prashaw, Michael Guiles, and Edward Law at the Gouverneur facility, and these employees all signed union authorization cards. When Guiles indicated that employee John Carlin would also sign a card, Matthews left a blank card with Guiles for Carlin. However, after Guiles gave the authorization card to Carlin, Carlin turned it over to his supervisor, Larry Whitten, and told Wheaton to apprise the Respondent's vice presidents, James Bruin and Chester W. Bisnett Jr., also known as ''Skip,'' what was going on.

Employee Impanel Guiles testified that the next day, while at work, Whitton asked Guiles and Law if someone from the Union had been at the facility the previous day and when they answered yes and that they had spoken with him for about 20 or 30 minutes, Whitton said that they might have to be docked a half hour's pay because they had talked to him on company time. Whitton also asked these employees if they had signed union authorization cards and they acknowledged that they had done so. Guiles added that the next day, January 19, 1991, Whitton informed Guiles and Law that they would not be docked for the time. It is reasonable to assume from the record evidence that Whitton also advised them at this time that Bruno would meet with the employees on January 24, 1991.

Matthews testified that on January 19, 1991, he received a phone call from Eugene Prashaw who advised Matthews that John Carlin had given his authorization card to his supervisor, Whitton, and that Whitton had at first told the employees who had spoken to Matthews that they should not have done so and that they might be docked an hour's pay for that, but subsequently Whitton had said that they would not lose any pay. Matthews stated that Prashaw also told him that on the following Thursday, James Bruno had arranged to meet with these employees at the Gouverneur facility. Prashaw's testimony regarding this was similar to Matthews' and generally similar to Guiles' except for adding the details that Bruno had made the decision to dock the employees an hour's pay and then had reversed the decision that day, this being conveyed to the employees through Whitton, and that

Bruno had agreed to meet with these employees soon thereafter.

However, in this regard, Bruno testified that Whitton had taken it upon himself to tell these employees that they might be docked for worktime used in discussion with the union representative and that Bruno, upon learning of this, had instructed Whitton to advise the employees that no such action would ensue. Bruno also testified that Guiles, Law, and Prashaw had, through Whitton and prior thereto, ''several weeks ago,'' requested a meeting with Bruno but that he had been unable to schedule such a meeting until Thursday, January 24, 1991. Guiles acknowledged in his testimony that these employees had indeed requested, through Whitton, to meet with Bruno about 3 weeks prior to its scheduling.

On January 21, 1991, Matthews and Carter met with Guiles, Law, and Prashaw at Law's home and it was decided to notify the Respondent by letter that these three employees had signed union authorization cards and had been designated officially as union ''committee people.'' The following morning, January 22, 1991, such a letter was hand delivered to Bruno by Matthews and Carter, with Bruno's only response being that he did not believe that the Union represented a majority of the Respondent's employees.

On January 23, 1991, Matthews obtained signed authorization cards from employees Mark Rood and Richard Walrath. By letter dated January 24, 1991, the Union notified the Respondent that employee Bryan Rose had signed an authorization card and had also been designated officially as a union ''committeeman.'' By separate letter to the Respondent also dated January 24, 1991, the Union advised the Respondent that it represented a majority of the Respondent's employees in an appropriate unit and ''demanded recognition based upon verification of the cards by a mutually agreed upon neutral third party.'' The Respondent's response to the Union's request was contained in an undated letter to the Union asserting its belief that the Union did not represent a majority of the Respondent's employees and that the Board's elective process would be the only way that the Respondent would recognize the Union as its employees' bargaining representative should the Union win such an election. By letter dated February 1, 1991, the Union indicated to the Respondent its intention to file a petition with the Board seeking such an election.

Matthews testified that there were approximately 60 employees in the unit appropriate for collective bargaining and that the Union had obtained 31 signed authorization cards from among these employees. However, Matthews admitted that some cards were signed after January 24, 1991, the date of the Union's letter to the Respondent claiming majority representation and demanding recognition on this basis, but explained that at the time this letter was sent the Union was unaware of the actual number of employees in the unit, specifically the number of employees at CBI Steel, Inc. and at the Respondent's Parishville facility. Be that as it may, Matthews also agreed that based upon the true number of employees in the unit, the Union would not have possessed signed authorization cards from a majority of these employees on January 24, 1991.[6]

[6] Matthews testified that at a meeting held in Bryan Rose's home on January 26, 1991, he obtained signed authorization cards from employees John Crumb, Ralph Shatraw, two employees named Niles and Stratton, and another employee whose name he could not remember. While Vern Arno attended this meeting, he did not sign a card. Also, at a union meeting with employees held a few days later at the VFW hall in Potsdam, additional signed cards were gotten but Matthews could only remember Todd Hayes' name.

The January 24, 1991 Meeting

On January 24, 1991, Bruno met with employees Guiles and Law. Although Prashaw was also supposed to attend this meeting, he did not do so. Guiles and Law raised the issue of raises and more work hours to increase their salaries, and Bruno explained that it was the Respondent's policy to review new employees after 6 months and other employees in April of each year, and to grant raises based on these performance evaluations. When Bruno learned that neither Guiles nor Law had received reviews even though they had been employed by the Respondent for approximately 11 and 7 months, respectively, he said that he would look into this. That same day Bruno granted Guiles and Law raises of 50 cents an hour after discussing their work performances with their supervisor, Whitton.

Moreover, Guiles testified that since Prashaw wasn't present at this meeting, he and Law complained about having to perform part of Prashaw's work, completing his route pickups, etc. Bruno testified that he had previously received ''sporadic'' complaints about Prashaw's work performance from Whitton, about once monthly, although these were never documented by the Respondent, and since Guiles and Law had complained about Prashaw,[7] and acknowledged that they could handle Prashaw's route between them since they were already performing part of his work anyway, Bruno decided to divide Prashaw's route between Guiles and Law and lay off Prashaw, this giving them extra hours of work as they had requested and accomplishing a substantial monetary savings for the Respondent.[8] According to the testimony of Bruno and Guiles, as it turned out consolidating Prashaw's route only added several hours weekly to Guiles' and Law's worktime, with Guiles characterizing this as having ''very little'' effect on their hours of work or overtime hours. Bruno maintained that the decision to let Prashaw go was based on the complaints about Prashaw made by Guiles and Law,[9] the Respondent's desire to give these employees additional hours of work as they had requested, and because this action would result in significant economic benefits to the Respondent. Bruno added that as of January 24, 1991, he was unaware of Guiles' support of the Union or what his feelings were in this connection.

Later that day, January 24, 1991, Bruno also met with employee John Carlin, who had also requested a meeting with Bruno. Carlin also asked for a wage increase and additional

[7] Guiles testified that although he and Law had complained to Whitton previously about having to perform part of Prashaw's work, his failure to complete his route, and his taking time during working hours for personal matters, and Whitton had said he would write Prashaw up for these infractions, Whitton never did.

[8] Bruno testified that laying off Prashaw would save the Respondent about $14,000–$15,000 annually in salary and that the actual savings amounted to $30,000–$40,000 if the use of a truck by Prashaw on his route were factored in.

[9] Bruno testified that no employees had suggested prior to January 24, 1991, that Prashaw's employment could be dispensed with by consolidating his route nor had he heard that fellow employees themselves were complaining about Prashaw.

work hours but was denied a raise since he had received salary increases previously and, according to Bruno, under the Respondent's wage policy Carlin was not due for a performance review until April 1991 as a basis for any salary increase. It would appear from Carlin's testimony that he did receive a small increase in his work hours after the Respondent laid Prashaw off, although the bulk of Prashaw's route was divided up between Guiles and Law, since, as Bruno asserted, he had learned on January 24, 1991, that they worked less than 50 hours weekly while the other drivers worked more than that.

The Termination of Eugene Prashaw

Prashaw commenced his employment with the Respondent on April 1, 1987, and worked as a truckdriver at the Respondent's Gouverneur facility. On Monday, January 28, 1991, Prashaw appeared at this facility to tell his supervisor, Whitton, that he would not work that day because two of his children were ill. Whitton not being present at the time, Prashaw left a note on Whitton's office door to that effect and left. That afternoon Prashaw called Whitton and was advised to bring in his keys, uniforms, and other equipment belonging to the Respondent, and that Whitton had a letter for him from Bruno ''explaining everything.'' After Prashaw arrived at the facility and returned the equipment, Whitton gave him Bruno's letter dated January 28, 1991, which stated that the Respondent had restructured its truck route system and was eliminating Prashaw's route which would be absorbed by other drivers, and that Saturday, January 26, 1991, was Prashaw's last day of employment. No other reason for his termination was set forth in this letter. Prashaw testified that of the four truckdrivers at the Gouverneur facility, Guiles, Law, Carlin, and himself, he was the most senior, had never received any warnings about his work performance, and had not been informed previously that his truck route was to be consolidated and his employment terminated.

Bruno testified that while he had received complaints about Prashaw's work over the years, Prashaw ''probably'' had never received any written warning notices regarding these complaints. However, Colleen Wallace, sister of two of the Respondent's owners, Michael and ''Skip'' (Jr.) Bisnett, and employed by the Respondent to handle personnel and administrative matters, such as health insurance and governmentally required reports, etc., testified that there were two written reprimands in Prashaw's personnel folder. These ''Disciplinary Action Forms'' are dated ''6/28/90'' and ''8/7/90,'' are signed by Larry Whitton as Prashaw's supervisor, but are not signed by Prashaw. These forms indicate that no disciplinary action was taken or recommended at the time, and appear to be more like incident reports than anything else. Moreover, Wallace did not know if Prashaw was ever shown these forms or was aware of them. Additionally, while the Respondent's attorney directly asserted that it was the Respondent's contention that these forms played a part in its decision to terminate Prashaw, Bruno, when asked why Prashaw's poor performance and employee complaints against him were not mentioned in his termination letter to Prashaw, responded, ''I just laid him off. I had no reason. It wasn't a disciplinary action.''

Prashaw testified that subsequently he was informed by Matthews that the Respondent was looking for a ''Roll-off Driver'' and by letter dated March 21, 1991, from Prashaw to Bruno, Prashaw requested consideration for the job. Prashaw stated that he also called Terry Morehouse the Respondent's dispatcher, and Morehouse told Prashaw that he would submit Prashaw's name to Bruno for the job. Moreover, the Respondent also advertised for a truckdriver in the Watertown Daily Times on April 16, 1991. Prashaw stated that while he was qualified for both positions the Respondent never contacted him nor offered him either of these jobs.

Additionally, Bryan Rose testified that while on occasion supervisors would substitute for a driver out ill or on vacation and drive a truck, when the Respondent was ''shorthanded,'' after Prashaw was laid off, this occurred more frequently and for longer periods of time. According to Rose, Whitton drove Prashaw's ''packer truck'' on three or four occasions for 3 or 4 days at a time, and Whitton had told Rose that E. J. Flanders, another supervisor, was driving a recycling truck in Canton, New York, ''on a daily basis for one or two months in a row.'' Moreover, since advertising for a truckdriver in April 1991, the Respondent hired the following truckdrivers: Peter Wimmer hired May 6, 1991, as a rolloff driver in Potsdam; Brent Vedard hired April 27, 1991, as a rolloff driver and left the Respondent's employ in September 1991; Philip Charleston hired May 1, 1991, as a truckdriver and worked only 1 week; and Gatel hired as a truckdriver also on May 1, 1991, and who worked 2 weeks only. Wimmer was still employed by the Respondent as of the date of the hearing. The Respondent also hired Danny White as a rolloff driver on March 14, 1991, but as Bruno explained, White was hired for the Gouverneur facility because the Respondent had purchased a new route which White was assigned to handle. White is still employed by the Respondent.

The February 4, 1991 Meeting

By posted notice to its employees that this was an ''extremely important meeting as it affects your future here and the future of our company,'' the Respondent held a ''special meeting'' with employees from all its facilities on Monday, February 4, 1991, in its Potsdam facility lunchroom. The notice also informed employees that they would be paid for attending the meeting with such attendance being required ''just like regularly scheduled work.'' The meeting was conducted by Bruno and ''Skip'' Bisnett Jr. who distributed an ''Evaluation of Management questionnaire'' to the employees informing them that the Respondent had problems and that by employees answering the questionnaires, the Respondent ''could get an idea on how they stood in their relations with their employees'' and the Respondent ''could find out which areas they had to look more into.'' Although most of the questions contained therein were work-related, question 43 stated: ''the employees of this facility do not feel that they need a union to speak and act for them.'' The questionnaires were marked ''confidential'' and specifically requested that employees not sign their names thereon. However, each questionnaire was group color coded and had a number at the top, and employee Bryan Rose testified that he believed that this number corresponded to the department an employee worked in since the number on his questionnaire was ''3'' and his department number on his paycheck stub as truckdriver was ''003.''

These questionnaires were prepared by the Respondent's labor consultant, Edwin Ricker, who also sent the Respond-

ent written instructions as to how to proceed therewith. Ricker testified that he had been retained by the Respondent on January 2, 3, or 4, 1991, to assist the Respondent in the area of ''employee relations,'' preparation of a new employee handbook, addressing problems of lack of communication between management and employees, implementation of a new drug abuse program which had resulted in employee concern, low employee morale, and ''a lot of employee unrest.''[10] Ricker stated that Bruno had hired him since Bruno was familiar with work he had previously performed for Super Duper in Potsdam involving a union organizational drive. Ricker recommended that the Respondent institute an employee questionnaire to determine how they felt about ''different things,'' then prepared the surveys and instructions by department and sent them to Bruno. Although Ricker's instructions included the recommendation for management to advise employees that they had the option not to complete the questionnaire and if an employee chose not to do so, there would be no reprisals taken against that employee, there is no evidence in the record that either Bruno or Bisnett did so at the February 4, 1991 meeting.

Upon completion, the questionnaires were collected by an employee that day selected by each employee group or department to act in this capacity and mailed directly to Ricker. Ricker testified that he received the surveys back the second or third week in February 1991 and in early March 1991 compiled the results thereof. Ricker stated that prior to February 15, 1991, Bruno called him to say that the Respondent had received the Union's demand for recognition and a notice from the Board that the Union had filed a petition for an election. Ricker instructed Bruno to respond to the Union's letter demanding recognition with a letter indicating the Respondent's belief that the Union did not represent a majority of the Respondent's employees and to advise the employees as to what was transpiring. Ricker related that Bruno subsequently called him and told him that due to employee comments about what was happening and their request for a meeting to find out what was going on, the Respondent wanted to hold a meeting with employees and would Ricker conduct such a meeting to which Ricker agreed.

Interestingly, Ricker also testified that the Respondent determined to hold a meeting with its employees because ''the N.L.R.B. recommended it.'' However, the Respondent's reference to the Regional Director's letter dated February 4, 1991, advising the Respondent that a petition for certification of representative had been filed by the Union as support of this contention is misplaced. The letter merely requests that the Respondent post the Board's ''Notice to Employees'' which sets forth the employees rights, and the Employer's and Union's obligations regarding proper conduct during the critical period before the election and nowhere therein does the letter recommend the holding of an employee meeting for any purpose.

[10] By letter dated January 11, 1991, to all employees Bruno mentioned the Respondent's new drug policy, referred to employee suggestions that the Respondent examine all its personnel policies, acknowledged that the Respondent had ''not done much in employee relations until the drug problem came up,'' and indicated its intentions to develop a ''total'' employee relations program in 1991, without mentioning anything about the retention of Ricker as its labor consultant to work in these areas.

The February l5, 1991 Meeting

By bulletin board notice dated February l2, 1991, the Respondent scheduled an ''Important Employee Meeting'' to be held at Uncle Max's restaurant in Potsdam, New York, on Friday, February 15, 1991. All employees were expected to attend and would be paid for such attendance at the meeting. The purpose of the meeting as set forth in the notice was to bring employees ''up-to-date as to what was happening, what is going on, and what will likely go on'' regarding the Respondent and the Union. Attending this meeting were Bruno, Michael Bisnett, and Howard Cornwell, another owner, for management, all supervisors, and all the Respondent's employees. According to the testimony of the General Counsel's witnesses, Mark Rood, Bryan Rose, Richard Walrath, Vern Arno, and Verde Snyder, and the Respondent's witness, Edwin Ricker, the employees were told by Bruno that the Respondent had the results of the questionnaires and realized that there were problems and had hired Ricker, a labor consultant, to straighten things out between the employees and management. After introducing Ricker to the gathered employees, the meeting was turned over to Ricker who addressed the employees.

Ricker explained the Board's election procedure and that the Union had wanted to be recognized as the employees' bargaining representative without an election but the Respondent felt that the employees should have the right to vote. Ricker told the employees that the Teamsters Union was involved with organized crime, the Mafia, that unions skim money from employees' retirement programs, and were usually really not interested in the employees they represented.[11] Ricker also spoke about programs that the Respondent would like to initiate but could not as long as the Union was seeking to represent them, such as: an employee relations program including a grievance procedure (internal dispute resolution committee to resolve work-related disputes) and a ''PKP'' program (pay for knowledge and performance). Ricker advised the employes that he had been hired by the Respondent to work things out between employees and management. In this connection Ricker told the employees that he was establishing a ''hot-line'' program in which forms would be available to employees to record thereon their questions regarding employee problems and any concerns about what the Union or the Respondent were saying during the organizational campaign, to which the Respondent would provide answers. Ricker acknowledged that he did not instruct the employees to refrain from including grievances or complaints they may have in the ''hot-line.'' Both Ricker and Bruno testified that Ricker made no promises to the employees at this meeting. However, Mark Rood testified that although Ricker made no promises, he did say that it was possible that various programs he mentioned might be instituted if the Union wasn't in.

After Ricker opened the meeting to employees' questions, an employee asked, ''[W]hat could be done in order to stop the union from coming in.'' Ricker explained that the employees could initiate a petition against union representation and if enough employees signed such a petition and it were presented to the Union, the Union might possibly withdraw

[11] While Rose testified as to Ricker's statements about the Teamsters Union and organized crime, Rose had made no mention of this in an affidavit given previously to a Board agent.

from the election. Mark Rood testified that Ricker also told the employees that, ''[I]f we didn't vote the union in and if we weren't pleased with what happened, that we could get them back in six months,'' and that, ''[T]here were other ways of making the work environment better without going union.'' At the end of the meeting Ricker apprised the employees that the Respondent would hold another employee meeting just before the election to answer ''last minute questions'' and to ''share with them the results of the survey.''

The Layoff of Verde Snyder

Verde Snyder started working for the Respondent in September 1988 as a rolloff driver but then was transferred to a mechanics position in September or October 1989. Snyder signed a union authorization card on January 28, 1991, spoke in favor of the Union to fellow employees at work, and attended two union meetings. Snyder testified that on numerous occasions during late January and early February 1991, he discussed the Union with his Supervisor Robert Dalton, telling Dalton that he thought the Union would be good for the employees and that Dalton agreed that the Union might also be good for the Respondent. Snyder also told Dalton that he felt the mechanics would all support the Union. Dalton testified that he knew that Snyder favored the Union because it was common knowledge at the facility although Snyder had never told him so directly.

Snyder testified that towards the end of January and the first part of February 1991, Dalton started assigning Snyder to perform all of the outside yard work on cranes and loaders, contrary to the past practice of having the mechanics share the outside work, although Snyder also worked indoors at times during this period. Because of the weather conditions this was more arduous type work than working inside the building. Snyder stated that also around this time Dalton stopped acting friendly towards him and when Snyder asked Dalton why this was happening, Dalton replied that the Respondent had told him not to be friendly with the employees.

Moreover, Snyder testified that about 1 week before his layoff by the Respondent on February 22, 1991, he asked Dalton why things had changed in the shop and why he was being assigned all the outside work rather than it being shared by the other mechanics as in the past, and also told Dalton that he had signed a union card and he didn't care who knew about it. According to Snyder, Dalton answered that ''the union thing has a lot to do with what was going on at the time.'' While Dalton denied that Snyder had complained to him about the outside work assignments and that he had assigned Snyder anymore outside work than the other mechanics, he did admit that Snyder had asked him why their usually friendly relationship had changed and was it due to Snyder being in favor of the Union. Dalton related that his response to Snyder was, ''That there's a lot going on about the union, and it was best for me not to say anything one way or the other.''

On February 25, 1991, while Snyder was preparing to start his workday Bruno came over and handed him a letter dated February 28, 1991, which stated that the Respondent had reevaluated the shop work and that because of the declining workload his mechanic's position was being eliminated, and that the previous Friday, February 22, 1991, was Snyder's last day of work. Snyder testified that when handing him the letter Bruno said, ''This is how the company feels.'' Snyder stated that he asked Bruno if he had been laid off or fired and Bruno only answered that the Respondent would not contest Snyder's application for unemployment insurance benefits. Snyder also asked Bruno if after working for the Respondent for 2-1/2 years, two of the other mechanics, one with 3 months' experience (Todd Hayes), and the other with 6 months' experience (Frank Snyder), ''are more valuable than I am'' and Bruno responded, ''Maybe.'' Snyder stated that Dalton, who was also present, told Snyder that the Respondent was planning to send out ''a lot more work'' to an outside vendor, although there is no evidence in the record that this was ever done. Snyder added that he had never received any criticism of his work performance while employed by the Respondent and that prior to his layoff he had been working 55–60 hours weekly, ''it was very busy,'' although in and around this time another of the mechanics, William Ramsey, was out sick.

Snyder also testified that at the time of his layoff, February 22, 1991, the Respondent employed the following mechanics: Frank Snyder, Todd Hayes, William Ramsey, Verde Snyder, and Supervisor Robert Dalton. According to Snyder, Dalton and Frank Snyder had had prior mechanical training while Hayes and Ramsey had none. Most of Verde Snyder's training was obtained during his employment with the Respondent. In June 1991 the Respondent hired Todd Hayes' brother, John Hayes, as a mechanic, although Hayes had no formal training as a mechanic. John Hayes was terminated 3 months later. However, Dalton testified that Todd Hayes was capable of performing major repair and motor overhaul work and that William Ramsey was mainly used as a ''tire man,'' maintaining the condition of tires on the Respondent's trucks.

Bruno testified that on February 13, 1991, he, Howard Cornwell, and Robert Dalton met to discuss the workload of the repair and maintenance shop because of the poor economic conditions in early 1991. Because of the decrease in the workload it was decided to abolish one mechanic's position and because Verde Snyder was ''the subject of consistent co-worker complaint, failure to work, poor attitude, smokes and drinks coffee all during shift, resentful of supervision,'' and the least qualified of the mechanics, his position was selected and he was laid off. Bruno stated that another reason for Snyder's layoff was his harassment of fellow employee Frank Snyder (no relation), witnessed by employee Todd Hayes. While Bruno testified that Snyder was laid off because his work was poor and he had made highly insulting and vulgar remarks to Frank Snyder, his letter to Snyder, notifying him of his layoff gives as the sole reason for such action the ''reassessment of the workload in our maintenance shop'' eliminating Snyder's position.[12] Moreover, when

[12] The Respondent submitted into evidence three documents assertedly from Snyder's personnel file, a report of work performance alleging three instances of faulty repair work by Snyder which is undated and unsigned by anyone, a multipart form dated 3–7–91 signed by Dalton alleging another instance of poor repair work by Snyder, and a ''Record of harassment of Frank Snyder by Verde Snyder'' listing two alleged instances of derogatory verbal harassment, one because Frank Snyder signed the petition asking the Union to withdraw from the election, the other threatening to do harm to Frank Snyder's car, with the dates these incidents occurred. This latter document is undated, signed by Dalton and Frank Snyder, not by Verde Snyder. Bruno testified that these documents were pre-

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Bruno advised Snyder of his layoff, he did not mention any of the problems the Respondent purportedly had with his work performance or the alleged harassment of Frank Snyder as the cause of this action, nor did Bruno ask for Snyder's explanation to any of this.

Robert Dalton testified that in early or mid-January 1991, Bruno and Cornwell approached him with a plan to restructure the repair and maintenance department ''because there was less work going on in the company.'' Dalton recommended that the Respondent reduce labor costs because the workload in this department was less in the winter time, whereupon Bruno accepted this suggestion and also Dalton's recommendation to lay off Verde Snyder because Snyder's type of service work slowed during the winter months, he was the least qualified of the mechanics, and he sometimes failed to complete his work or to properly perform it. However, Dalton also testified that work in the maintenance department usually picks up starting in April or May of the year, that prior to February 1991 no mechanic had ever been laid off by the Respondent although he attributed this fact to the Respondent's business expansion, and that during the months of February and March 1991 the mechanics worked significant amounts of overtime, from 55–60 hours weekly, although the actual workload decreased after Snyder was laid off. Verde Snyder was rehired on July 15, 1991, and was still working for the Respondent at the time of the hearing.

The Petition

A petition in effect requesting the Union to withdraw from the election was subsequently circulated for signatures among the Respondent's employees by William Henry, employed by the Respondent at its CBI Steel, Inc. facility. Henry testified that he prepared this petition because Ricker had mentioned it at the February 15, 1991 meeting and based on his own discussions with fellow employees about union representation. Henry related that he began asking employees to sign the petition about ''two to three weeks'' after the February l5 meeting, prior to the middle of March 1991, and of employees at ''CBI Steel, Parishville, recycling plant, and Waste Stream Management,'' during nonworking hours. Henry stated that management was unaware of what he was doing and that he sent the signed petition to the Union directly on or about April 1, 1991. When asked why he did not send the petition to the Union by certified mail to record its receipt he replied, ''[N]obody told me to do it that way.''[13] However, in an affidavit given to a Board agent during the investigative stage of these proceedings, and dated May 30, 1991, Henry stated that he had prepared and circulated this petition ''around the last week in March, 1991,'' and had obtained about 35 employee signatures from ''all employees in the shop (obviously meaning CBI Steel, Inc. and not employees of WSM (Waste Stream Management). I did go to Parishville with it.''[14]

Mark Rood, also employed by the Respondent at CBI Steel, testified that during the week following the February 15, 1991 meeting at Uncle Max's Restaurant, he became aware that such a petition was being circulated by Henry at this facility. Rood stated that he was then approached by Henry to sign the petition but refused to do so. From Rood's testimony about what occurred the very next day, February 26, 1991, it appears that Rood's refusal to sign the petition occurred on Monday, February 25, 1991. Rood continued that after attending a union meeting at which the Union indicated that it would not withdraw from the election even if it received an employee petition requesting such action, Rood signed the petition. Rood added that he also signed the petition since ''it would give the company the impression that I was not for the Union'' since he believed that the Respondent wanted this and he was seeking management's favor'' in light of prior terminations.''

Verde Snyder testified that while working at ''the test workbench he observed Frank Snyder signing the petition whereupon Henry then looked at him and said, ''Ho, Ho. I don't suppose you want to sign this,'' and Verde Snyder responded, ''No, I don't.'' Snyder stated that this occurred during working hours but after Dalton had left. Snyder related that he also saw Henry with what appeared to be a ''computer printout that he had gotten from the company, with all the employees' names,'' and that, ''I noticed he was marking as people were signing them here.''

Harold Bush, employed by the Respondent at CBI Steel, testified that in late February or early March 1991, Henry asked him to sign the petition against union representation. Bush told Henry that he wanted to hear the Union's side and refused to sign it. Subsequently, after attending a union meeting, Bush signed the petition which was lying on Henry's worktable. Bush stated that about 5 minutes after he had signed the petition Michael Bisnett came over, put his arm around Bush, thanked him for signing the petition, and said he appreciated it. Moreover, Bush observed another employee sign the petition after which he saw Henry and Michael Bisnett pointing at that employee with the petition either in Henry's hand or back on the table. Bush continued that when Henry had asked him to sign the petition Henry had said that, ''[N]one of the bosses would know who signed it. . . . No one will know about this.'' Later when Bush reminded Henry that Henry had said that no one was going to know about the petition, Henry responded, ''What do you

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pared after Verde Snyder was laid off, he did not know who prepared the unsigned document, and was unaware if Verde Snyder even knew of the existence of these reports in his personnel folder.

[13] The General Counsel assets that Henry's reply leaves the ''implication that some Respondent official was directing him in his solicitation activities.'' However, another ''implication'' which arises could be that since Henry implemented the petition partly because of Ricker's mention of it without Ricker elaborating on the mechanics thereof, that Henry was referring to Ricker's failure to do so at the February 15, 1991 meeting.

[14] Henry's explanation for this apparent inconsistency was that he was unaware of these statements in his affidavit because it was written out by the Board agent whose handwriting he could not read and who had failed to read its contents to him before he signed the affidavit. However, Henry admitted that he signed the affidavit acknowledging that he had read and understood its contents, certified to its truth and correctness by signing it, and had initialed each page of the affidavit at its bottom line. Moreover, Henry's denial that the Board agent had not asked him questions to elicit the above information seems unlikely and unbelievable, although he became less than sure about this when questioned by the Respondent's attorney. Henry now seemed unsure about when he actually started circulating the petition other than to maintain that he started this prior to his assisting his foreman, Steven Hall, in the performance of Hall's duties which occurred in mid-March 1991. Henry's status as a supervisor is in issue.

care? You signed it, didn't you?'' Bush added that he became aware of the Union's organizing campaign in February 1991, attended only the one union meeting, and did not sign a union authorization card.

Michael Bisnett admitted that he was aware that Henry was circulating an antiunion petition but he never encouraged Henry's action in this regard or played a part in it. Bisnett also admitted thanking Bush for signing the petition since he had observed the petition lying on Henry's desk and Bush's signature thereon. However, Bisnett denied putting his arm around Bush or that he and Henry had reviewed the list of signatures regarding the finger-pointing incident.

Bush also related that towards the end of March 1991, on several occasions that day, Michael Bisnett told Bush, ''Yoo Hoo, Harold, I'm watching you.'' However, Bush stated that he did not know what this meant or to what Bisnett was referring to. Bisnett denied making any such statements to Bush.

Richard Walrath testified that 1 week before his termination, he viewed the petition and was asked by an employee from CBI Steel to sign it but he would not do so. Walrath stated that he saw this employee place a mark by his name after he refused to sign the petition. Walrath added that his supervisor, Terry Morehouse, was nearby in the dispatcher's office when this occurred.

The Termination of Mark Rood

Mark Rood began his employment with the Respondent in September 1989 as a truckdriver at its CBI Steel facility. Rood testified that on February 26, 1991, he and Fabrication Engineer, Edward Potts, were discussing truck weight limits with regard to overweight loads and they decided to bring Michael Bisnett into the discussion. Rood related that while checking a New York State Department of Transportation weight specification listing, Bisnett, in response to a question, told Rood, ''Why don't you just take this sheet to your rep and he'll straighten it right out for you.'' Rood stated that he understood this to be a reference to Union Representative Matthews, since Matthews was the only ''representative'' of any sort that Rood had contact with at the time, and because Rood's father Gerry Rood, who does business with the Respondent at CBI Steel, had told Mark about a conversation he had had with Michael Bisnett about unions, during the week of February 17, 1991, in which Bisnett had asked his father, ''Why is Mark so hell-bent on getting a union in here.'' While Bisnett admitted talking to Gerry Rood about the Union and asking him, ''What's Mark thinking of?'', he denied telling Mark Rood to see ''his representative'' when Rood had questioned him about truck weight specifications. Potts who was also present denied hearing Bisnett make such a statement. Moreover, Bisnett admitted that he knew that Mark Rood supported the Union.

Rood testified that also on February 26, 1991, shortly after the above incident with Bisnett, as he was preparing to take his truck out on his route, Michael Bisnett told him to ''Make sure your pants are clean, because the next guy who drives the truck might want the seat to be clean.'' Rood stated that he considered this a ''serious statement'' in light of his prior conversation with Bisnett and what his father had told him, and the fact that he mostly drove this particular truck at work. Rood added that also present when this remark was made were Potts, William Henry, Steve Burdict, and Rood's supervisor, Steve Hall. While Potts denied hearing Bisnett make such a statement, Bisnett testified that observing Rood with greasy work pants he had told Rood to keep the truck clean for other drivers and not to get ''any excess grease or dirt on the inside of the trucks.'' Bisnett maintained that this certainly was not meant as a threat of any kind related to Rood's union activities.

On February 27, 1991, after placing a load of steel on his truck, Rood forgot to lower the truck's loading boom and, while backing under the building's overhead door, he accidently struck the building damaging the wall and the canopy over the door. Rood testified that he immediately reported the mishap to Bisnett and apologized for the accident and Bisnett told him that while he knew Rood was sorry about the damage he would have to let Rood know later what the Respondent intended to do about this. Rood recounted that upon his return to CBI Steel later that afternoon he was told by Potts that while Potts did not know how Rood felt about the union situation, if Potts were Rood, in light of the accident which happened that morning, Potts would act very nonunion since the Respondent was looking for a reason to get rid of Rood and Rood may have given them a reason that very morning. Potts admitted that he had told Rood that his being associated with the Union ''might not be in his own best interest.''

On March 1, 1991, while at work, Rood was given a letter terminating his employment with the Respondent by Chester Bisnett Jr. and James Bruno. The letter indicated that Rood had been trained in operating the truck boom and was being fired because of the accident on February 27, 1991. Rood told Bisnett and Bruno that he had never received any such training but notwithstanding this he did sign the termination letter. Rood stated that he had never received any prior warning notices although he had been involved in two prior accidents in 1990, one in which he damaged a customer's hydraulic pump at a well site, and another in which he damaged the tailgate of his truck while loading a steel beam. Rood related that when he reported these prior accidents to Michael Bisnett, Bisnett told him to be more careful and try not to have any more accidents. Rood received no discipline for these incidents.

Michael Bisnett testified that he was aware that Rood was a union supporter before he was terminated and that Rood was a good employee. In what appeared to me to be evasive testimony on his part Bisnett testified that Rood had been involved in some accidents prior to the incident on February 27, 1991, and that he ''probably'' told Rood ''not to do it again.'' However, in an affidavit given to a Board agent, Bisnett had stated that Rood had no accidents of any consequence in the past and did not have to be warned about safety procedures. According to Bisnett, Rood was terminated because after raising his truck boom, he failed to lower it before moving and smashed the boom into the front top of the building.

Chester Bisnett Jr. also testified that Rood was a good employee but ''argumentative.'' Bisnett Jr. stated that he and Bruno had made the decision to terminate Rood solely because of his accident with the boom, and although there was extensive damage to the wall struck by the boom, this was not an important consideration regarding Rood's termination. According to Bisnett Jr. and the testimony of Colleen Wallace, although Wallace played no part in the decision to dis-

charge Rood, the deciding factor in Rood's termination was the seriousness of the accident in that it could have resulted in loss of life. Rood's truck route even on the Respondent's premises took him under overhead high tension wires and should the raised boom strike such electric wires Rood could have been electrocuted. Bisnett Jr. added that he was unaware at the time that Rood had been involved in any prior accidents.

Rood was rehired by the Respondent on July 15 or 16, 1991, and was still in the Respondent's employ at the time of the hearing.

The Termination of Richard Walrath

Richard Walrath commenced his employment with the Respondent on June 29 or July 2, 1990, as a rolloff driver at the Respondent's Potsdam facility. Walrath signed a union authorization card on January 23, 1991, attended one union meeting prior to his discharge, and spoke favorably about the Union to his fellow employees.

On February 19, 1991, while rotating a compactor unit at the Newton Falls Paper Mill, Walrath creased the top of the container. When Walrath returned to the Potsdam facility, he reported the accident to Terry Morehouse his supervisor, who told him not to say anything about it. Morehouse testified that Walrath had told him that he had put a ''small dent'' in a compactor unit and Morehouse therefore said that Walrath should not worry about it since ''small dents are very common.'' Morehouse testified that thereafter, when employee Bryan Rose picked up the compactor unit and returned it to Potsdam he showed Morehouse an 18-inch crease at the top of the unit, the top was crushed. Walrath denied that he had told Morehouse that there was a ''little crease'' in the unit.

On February 21, 1991, Walrath was advised by Morehouse that Chester Bisnett Jr. had viewed the damaged compactor unit and wanted to speak to Walrath. According to Walrath, Morehouse told him to tell Bisnett, Jr. that Walrath had tried to tell Morehouse about this but that Morehouse was too busy at the time to listen and instead sent Walrath out on another route run and it was later forgotten. Since Bisnett Jr. was busy that day, Walrath did not get to see him.

On March l, 1991, Walrath was called to Bisnett Jr.'s office. Bruno was also present when Walrath got there and he was handed a letter terminating his employment. Walrath testified that when he tried to explain about the accident, Bisnett Jr. refused to listen and referred to two other accidents Walrath had had previously and this last one. Walrath related that the damaged container was repaired by the Respondent at its CBI Steel facility and that it was not uncommon for drivers to damage such units with dents and creases. Walrath's two prior accidents occurring in July and August 1990, both times involved a box falling off the truck and damaging the truck's taillight and fender. Walrath stated that the first time this happened nothing was said to him about it, but after the second accident he was given a written warning notice and Bisnett Jr. told him that if he had another accident, ''Disciplinary actions would be taken'' against him.

According to the testimony of Chester Bisnett Jr. and Colleen Wallace, in the summer of 1990, the Respondent's insurance carrier ITT Hartford Insurance Company, asked Bisnett Jr. to investigate and report, in detail, accidents which occurred and the Respondent hired Colleen Wallace as its regulation compliance coordinator and employee relations representative to perform some of this work. After a visit by a representative of the insurance company in November 1990 pointed up the inadequacy of the accident investigation procedure, Wallace instituted a series of report forms (vehicle accident reports, incident reports, supervisor's damage incident reports, and injury reports) which forms were given to the Respondent's supervisors in December 1990. Wallace then sent a memo to management with the insurance representative's recommendation including a policy on postaccident discipline.[15] This included the use of written reprimands when a driver is at fault for the accident and ''job termination for frequent accidents.'' In enunciating the Respondent's defense to the allegation that Walrath was terminated solely for cause, counsel for the Respondent stated that under its policy, implemented in December 1990, prior to the advent of the Union's organizing campaign, the Respondent discharged employees after three accidents in which they were at fault.

The record evidence shows that this policy was not reduced to writing and issued to the Respondent's employees, although Rood testified that the Respondent's disciplinary procedure was ''common knowledge'' among employees, brought to their attention by their supervisors ''many times,'' and consisted in an initial written warning for the first incident, a second offense would bring ''a write up and a three day, without pay, time off thing,'' and the third offense may result in dismissal. Additionally, the Respondent's employee manual, effective since 1988 states:

> Page 7—Discipline—
>
> In those rare, extreme cases where a discharge is necessary, the employee will be given the reasons and as much warning as possible that such action is pending.
>
> Page 11—Termination for Cause—
>
> Every attempt will be made to let an employee correct these problems before the need for dismissal becomes the only alternative.

Wallace testified that Walrath was terminated because he was involved in three accidents due to his own fault and occurring after December 1990. However, after Wallace was asked if any other employees had three accidents after the discipline policy was implemented in December 1990, ''disregarding Mark Rood at this point,'' except Walrath, she responded ''No.'' Wallace was then asked if the Respondent's policy terminating employees necessarily required three accidents at which time Wallace now answered, ''the issue was more of the gravity of the situation . . . and who was at fault.'' Moreover, the Respondent introduced into evidence a memorandum to all employees dated March 16, 1990, which ''clarifies'' the Respondent's use of written reprimands for

[15] A letter from the insurance carrier's representative, James P. Sloan, reporting his findings on his visit to the Respondent's facilities dated November 29, 1990, neither states that there is a deficiency in the Respondent's then accident reporting procedure, in fact commending the Respondent on its use of ITT Hartford Accident Investigation Forms, nor mentioning anything about a postaccident discipline policy.

tardiness, absenteeism, misuse of equipment, failure to follow work and safety rules, failure to get along with coworkers and alcohol and drug abuse, any combination of which ''may be grounds for termination.'' Vernon Arno signed his memo on March 20, 1990, and Mark Rood on what appears to be June 16, 1990.

Bisnett Jr. testified that Walrath had been terminated because he was involved in four accidents, within a 6- to 8-month period, the first in September 1990 wherein he damaged the fender and taillight of his truck, the next when he damaged a 2 by 4 foot wooden support of a scale at a landfill site, the next a repeat of the first wherein he caused a rolloff container box to fall off the truck and damaging the vehicle which he failed to report allegedly because Bisnett Jr. had instructed him how to avoid such accidents when he had the first one, and the denting of the compactor unit described hereinbefore, which Bisnett Jr. considered quite serious since Walrath could have caused damage to a customer's property with this accident and the Newton Falls account was one of the Respondent's major customers.

Various of the witnesses for the parties herein testified as to accidents in which other employees of the Respondent were involved. Employee Gene Pharo in 1985, while operating a crane, ''took the windshield out of a loader'' and on March 1, 1991, while operating a truck allowed a loaded scrap bin to fall off the truck onto a Potsdam street for which he was ticketed by the police. Pharo received no discipline for these accidents from the Respondent. Driver Ceylon Foster while removing a compactor unit at the Kraft Food plant sometime in February 1991 damaged a building wall, which cost the Respondent $12,000 to $13,000 to repair. Although it appears from Bruno's testimony that Foster was at fault regarding this accident, Bisnett Jr. testified that Foster was not at fault and Foster was not disciplined for this by the Respondent. Walrath testified that from conversations he had with Foster he believed that Foster was against the Union. Driver Wade Rivers, who replaced Rood backed his truck loaded with a steel beam into a wall and dented it. River's was suspended for 3 days without pay for this accident.

Additionally, driver Robert Converse dented the side of his truck backing into a steel warehouse, smashed his trucks clearance lights and mirror while backing up, dented a fuel tank while driving a tractor-trailer, almost caused injury to another driver when he prematurely moved his flatbed truck while it was being unloaded all in 1990, receiving a 3-day suspension for the latter incident, and in August or September of that year narrowly missed being struck by a train while incautiously crossing railroad tracks. Converse was not disciplined for denting the side of his truck or the fuel tank because as Bisnett Jr. testified in the case of the fuel tank he was being directed by another employee when this happened. Bisnett Jr. stated that after hearing some employees discussing Converse's narrow escape from being hit by a train he asked Converse to explain what happened and Converse said ''that it was not even close although he had failed to come to a complete stop at the railroad tracks as required by stop signs located there. After lecturing Converse about compliance with such signs, he spoke to the other drivers about obeying traffic signs at railroad crossings. Since Converse had been with the Respondent for a number of years and he had denied the closeness of the danger, the Respondent imposed no discipline for this incident. However, as regards the August or September incident in 1990, Bisnett Jr described an accident occurring in about August 1991 wherein Converse pulled away from a loading dock before a forklift had cleared the back of the truck, almost injuring the forklift driver who complained to his supervisor about this and Converse received a 3-day suspension as discipline.

Also driver William Converse, Robert Converse's son, raised the hoist on his rolloff truck and damaged an overhang at the psychiatric center in 1988, and in 1989 allowed a compactor unit to fall off his truck in the middle of an intersection and converse was not disciplined for either accident. However, Bisnett Jr. explained that in both these instances, Converse was being directed by another person during the first incident and was not the driver in the second but was instructing a trainee who was the actual driver, and being not at fault was not disciplined for these accidents. In 1990, driver Ralph Shatraw struck and knocked down overhead signal lights while transporting a large waste bin unit without receiving any discipline regarding this. Bisnett Jr. testified that he had instructed Shatraw to transport the oversized container unit not realizing what might happen and he took responsibility for this accident.

Moreover, driver Fred Wright damaged the rear end of his truck through abuse on three or four occasions in 1990, for which he received no discipline. However, Bisnett Jr. indicated that the fault was in the design of the truck's rear end and after replacement thereof under warranty, there was no further trouble with Wright driving the vehicle. Driver Duane Stratton damaged the hood of his truck which required its replacement, this occurring prior to the commencement of the Union's organizing campaign. In explaining why Stratton received no discipline for this incident, Bisnett Jr. stated that Stratton was given a new truck to drive, although it appears that he had driven a similar truck with his prior employer, and his lack of any other accidents persuaded Bisnett Jr. that no discipline was warranted. Driver Calvin Rose damaged an overhang at the Ogdensburg Psychiatric Center with his hoist in 1988, and in the latter part of that same year, in an accident which seems to me to be reminiscent of the incident for which Mark Rood was terminated, Rose, while moving rolloff containers with his up-raised hoist struck and knocked down overhead telephone wires attached to the Respondent's Ogdensburg facility, ''shorting the electrical wires.'' No discipline was imposed in either case because, according to Bisnett Jr., Bisnett felt that he was at fault for not warning Rose to be careful in the first incident and not advising Rose to refrain from driving his truck around with his hoist in the air. Also driver Frank Snyder lost control of his truck, ran off the road and dented the fender which required replacement. This occurred in April or May 1991 and Snyder was not disciplined for this. In 1987, employee Jeff Fuller backed his loader into the magnet of a crane smashing the radiator at the Potsdam scarp yard. He received no discipline for this incident.

Additionally, Bruno testified that from April 1, 1987, through January 1991, in those instances of accidents involving equipment damage by employees at fault, no employee had been terminated because of such accident.

The Termination of Robert Monroe

Robert Monroe commenced his employment with the Respondent as a truckdriver in the fall of 1989. Monroe worked

with two other drivers, Robert Perry and Michael Miller at the Respondent's facility. According to the testimony of Perry and Miller, at first Monroe was a good driver but then, about 3 or 4 months into his employment, Monroe began to miss customers on his pickup route, failing to complete his assignments and not discharging his duty to keep the garage clean. Perry and Miller complained to their supervisor, Tim Abplanalp, about Monroe's work on several occasions in 1990 and although Abplanalp said he would speak to Monroe about this and also report the complaints to James Bruno, nothing changed. Sometime in late February 1991, Perry and Miller again complained to management about Monroe and suggested that they could handle Monroe's route between them.

Bruno testified that in late February 1991 being aware that they were having problems with Monroe, he met with Perry and Miller. Miller testified that this occurred on a Sunday in March 1991, the day before Monroe was terminated on March 11, 1991. Bruno stated that Perry and Miller explained how they could accomplish taking over Monroe's truck route, and having had a similar experience in previously reassigning Prashaw's truck route to Guiles and Law and terminating Prashaw not too long ago, Bruno decided to split Monroe's route between Perry and Miller and to terminate Monroe. By letter dated March 11, 1991, listing his failure to keep the garage clean, to perform his duties fully and his unsafe driving habits as the reasons for his termination, Monroe was fired. The Respondent then split up Monroe's route between Perry and Miller. Perry testified that it had taken Miller and himself sometimes 2 to 3 hours a day, ''a couple hours a day or more,'' to complete Monroe's route when he failed to do so. Also, Miller testified that although he didn't want anyone to lose his job, yet he was aggravated by Monroe working only 30 hours weekly and being paid for 50 while he and Perry worked 50 hours weekly and were paid for 50. With the split up between them of Monroe's route, Perry and Miller now worked 2 to 3 hours extra per day plus overtime on occasions.

The April 3, 1991 Meeting

By posted notice to employees on its bulletin board, the Respondent held a meeting with its employees on April 3, 1991, 2 days before the scheduled Board election on April 5, 1991, at the Knights of Columbus Hall in Potsdam, commencing at 4:30 in the afternoon. Ricker addressed the employees and, according to his testimony, indicated that the results of the surveys taken by the Respondent showed employee concerns in certain areas and that the Respondent would like to remove these concerns by providing the following: a ''Pay for Knowledge and performance'' program (PKP), an ''internal dispute resolution committee'' program (IDRC), a new employee handbook (already being worked on), better communications between the employees and management, and a job bidding and posting procedure. Ricker stated that he said that these recommendations would be instituted if the Union lost the election or, if the Union won, then the Respondent would negotiate with the Union in regard to these issues. Ricker added that except for the employee handbook, these were all new programs.

Additionally, Ricker spoke about the ''hot line program'' instituted by the Respondent during the Union's organizing campaign, and told employees that they could ask anything, any items or concerns about what the Union and the Employer were saying and about the Board's election procedure and that these questions would be answered by the Respondent. Ricker acknowledged that he had not told employees to refrain from including any grievances or complaints they may have. Ricker related that using charts he also spoke about the parent Teamsters Union's strike record of violence, the projected cost to employees of dues payments, etc., over the life of a collective-bargaining contract and the union voting procedure. Ricker admitted that he was unaware as to whether or not Local 687 was involved with organized crime (Mafia).

Regarding this meeting, Bryan Rose testified that Ricker had told employees that it was 2 days before the election and that, ''He had plans of what things he had come up with to help the company out, whether the union came in or not.'' Ricker mentioned better wages, benefits, job reclassification, better communication, and job orientation. Ricker handed out copies of the IRDC plan providing for a five-person committee, two employees chosen by the Respondent, two by the grievant, and one by random drawing, to recommend changes in company policy or to hear appeals from discharged employees.

The Termination of Vern Arno

Vern Arno commenced his employment with the Respondent on April 29, 1989, as a rolloff driver at the Respondent's Potsdam facility. Arno was laid off at his own request from December 8, 1990, to February 25, 1991. Arno attended the meeting with union representatives on January 26, 1991, at Bryan Rose's home and two union meetings at the VFW building in Potsdam, the last one being held on March 24, 1991, wherein 12 to 15 employees attended. Arno testified that at the March 24 meeting he gave a letter to one of the union representatives detailing complaints about low wages, long hours, and the Respondent's other acts of unfairness towards employees. Arno stated that he asked the union representative to read the letter at this meeting but not to disclose who wrote it because there was a ''company stoolie'' at the meeting. Arno related that after the letter was read and placed on a table for anyone to read, Bill Converse, the employee whom Arno had referred to as the ''company stoolie,'' said that after reading this letter he was now for the Union. Arno then stood up and voiced his complaints against the Respondent about wages and working conditions, and stated that he did not care if anyone wanted to take his remarks back to the Respondent. Prior to this meeting Arno had not supported the Union, having spoken against union representation at the February 15, 1991 meeting with employees called by the Respondent at Uncle Max's Restaurant.

Thereafter, Arno became active in support of the Union speaking to employees in its behalf. Arno stated that on one such occasion, within a week more or less after the March 24, 1991 meeting, while in the lunchroom with four or five other employees, an employee read aloud a piece of literature distributed by the Respondent which said that union dues would be $32 monthly if the Union won the election and the employee indicated that he would be unable to pay such a high amount, and Arno told them that this was ''bullshit,'' and ''scare tactics'' by the Respondent. Arno also recounted another incident in late March or early April 1991 wherein his supervisor, Terry Morehouse, asked him to go out on an-

other run with his truck after he had returned late in the day, and Arno replied that he was tired, and that he would vote for the Union in the election because ''something had to be done,'' about working conditions.

Arno testified that on April 8 or 9, 1991, following the Board election while he was in Morehouse's office, the Respondent's president, Chester A. Bisnett Sr. asked Arno what he thought about the election vote. Arno replied that while the Respondent won this time, ''If they don't let us know what they are going to do about changing things like they said they were going to do . . . . If the Union wins again, I'll vote for it again.'' Arno stated that he also told Bisnett Sr. that he was sick and tired of the long hours and low wages whereupon Bisnett Sr. responded, ''Well, it I was running this place, I would lock the doors and send everyone home.'' Bisnett Sr. then told Arno that, ''he would never have the union.'' Bisnett Sr. did not testify at this hearing.

Arno testified that on April 11, 1991, after returning from ''a run,'' Morehouse assigned him to another one. While fueling up for this next run, Arno backed into a crane and after reporting this to Morehouse, also advised Morehouse that he should not be driving since he was overtired. That same day while Arno was at the St. Lawrence University site to replace a compactor unit there, a strong wind blew papers from the loaded unit around the area. Arno stated that someone from the University complained to him about the papers blowing around and said he would report this to Bisnett Jr. Arno told him to ''call whoever you want'' and that Arno was working as fast as he could to gather up the papers and had no control over the wind. While Arno was picking up the papers strewn about, Dave Kennedy and another of the Respondent's employees dispatched by Morehouse to help Arno, arrived to clean up the papers and, according to Arno, ''by that time I had most of everything picked up anyway.''

Arno continued that upon his return to the Respondent's facility Bruno asked him about what had happened and after Arno explained what had occurred, as above, Bruno told him that John Stickler, the University's manager of custodial services had complained that Arno was rude and arrogant to him and that he would never tolerate an employee like Arno working for him.[16] Bruno also advised Arno that he had received another complaint from a farmer who said that Arno had spoken to him about the Union and told him that if the Union got in, some drivers would refuse to unload a delivery while others would not. When Arno admitted making such a statement to the farmer,[17] Bruno hit the desk and told him that he ''had no business talking to anyone about the union.'' Arno stated that he then told Bruno that no one could tell him not to talk to anyone he works with but Bruno replied, ''No, you have no business talking to anyone about the Union. You know nothing about our business.''

Arno related that Bruno then questioned Kennedy about the extent of the paper blowing loose at the University campus and Kennedy said that ''there was a little handful.'' Arno testified that Bruno asked him what was bothering him and Arno answered that he had told Morehouse about his fatigue that morning and he shouldn't have been driving that day, but that this made no difference since the Respondent didn't care about him. When Bruno asked Arno if there was anything else bothering him and Arno responded that he was sick and tired of long hours and low pay, Bruno told Arno, ''Okay, that does it,'' and directed Arno to leave, take 3 days off and return the following Monday when Bruno would let him know if he still had a job with the Respondent. Arno then left the premises.

John Stickler testified that he had observed Arno emptying papers from the compactor onto the ground which were being blown around the campus by the wind, and when he asked Arno what he was doing Arno explained that he had to do this in order to ''put the boot on the compactor.'' Stickler inquired of Arno as to who was going to clean the papers up and Arno said, ''I'm not.'' After Stickler told Arno to stop what he was doing and Arno said he didn't care about the job, Stickler called the Respondent and told management that Arno had a ''bad attitude,'' that papers were flying all over the campus, and demanded that the Respondent clean the mess up. Stickler added that he asked that Arno not be sent to the University campus site again.

Arno returned to work on April 15, 1991, and was given a letter of termination by Bruno which stated as the reason for his discharge ''poor attitude in your dealings with valued customers.'' This letter listed two instances of his poor attitude, one being the St. Lawrence University campus incident described above and the other, his inconvenience of a ''potential bedding customer by delivering at the wrong time and dumping the load in a fashion that blocked the customer's driveway,'' and his unpleasantness and discourtesy to the customer's wife. Moreover, the letter states that when Bruno confronted Arno with the St. Lawrence University incident, Arno stated, ''I don't care if I work here or not.''

Arno stated that he explained to Bruno that sometime in late February or early March 1991, he had two loads of bales to deliver that day and Morehouse had directed him to make the delivery to farmer John Barry, second, which he did. Barry wasn't present and his wife berated Arno for being late and arriving after the laborers hired to unload the bales into the barn had left. Mrs. Barry insisted that Arno unload the bales into the barn and Arno refused since he was alone. Mrs. Barry finally agreed to have Arno unload the bales near the barn door since the bales were free. Subsequently, Arno was directed to return to farmer Barry and pick up the bales and deliver them to another person, since Barry had called Morehouse, become abusive on the phone, and Morehouse hung up on him, saying that, ''We will never deliver anything to those people again.'' Arno recounted that Bruno said that this made no difference and that Arno was fired. When Arno asked Bruno about a recommendation for another job Bruno said that he would have to show this letter to the next employer. When Arno asked about unemployment compensation Bruno told him that it would be easier to get if he signed the termination letter, which Arno had at first refused to sign as being untrue, and Arno then signed it. Arno added that as he was leaving Bruno, put out his hand and said,

[16] Morehouse testified that Stickler had told him on the telephone that the driver (Arno) had been rude to him and then Morehouse had given the phone to Bruno. Morehouse stated that it took two men 2 hours to clean up the papers, which included travel between the Respondent's facility and the University campus.

[17] Arno testified that the Union was brought into this conversation with the farmer because the farmer's son had heard about the Union's attempt to organize the Respondent's employees and had asked Arno about this, and Arno had said that the employees wanted the Union because of long hours and low wages.

''I'm sorry Vern . . . I don't know if you were doing your work.'' Morehouse denied that Barry had been abusive to him on the phone or that he had told Arno that the Respondent would no longer do business with Barry.

Bruno testified that the incident that precipitated Arno's termination was the St. Lawrence University incident and Arno's problems with farmers. Arno was ''agitating people . . . in regards to the union . . . expressing company policies that are probably going to change after the union got involved.'' Bruno stated that his remark to Arno after learning what Arno had said to the farmer about drivers picking up loads after the Union got in was, ''I don't want you to talk about company policy regarding the union to our customers. You have no idea what the company policy's going to be after the union's in here. I don't feel we should be upsetting people, our customers, based on that at the time.'' Bruno maintained that he was unaware at the time that Arno was in favor of the Union since Arno had always said that he was against union representation, and at the February 15, 1991 meeting with employees at Uncle Max's Restaurant, Arno spoke vehemently against the Union. Moreover, Morehouse testified that Arno had never told him that he was in favor of the Union including the conversation between Arno and Chester Bisnett Sr. at which Morehouse was present.[18]

Arno testified that on April 19, 1991, he telephoned Morehouse to see if his final paycheck was ready and Morehouse said that it was. Arno asked Morehouse if he thought it was right for the Respondent to fire him and Morehouse said that both he and Bisnett Sr. felt that Arno should have been ''talked to'' and ''not fired like that.'' According to Arno, Morehouse also said that Arno had ''ticked Bruno off . . . talking about the long hours and the wages . . . and the union.'' When Arno picked up his check later that day from Morehouse he had to sign a release stating that his termination was for ''poor attitude.'' Arno asked Morehouse if he had ever seen Arno with a poor attitude and Morehouse shook his head indicating no. Morehouse acknowledged that Arno had asked him if he had a poor attitude and that Morehouse may have responded, ''No.'' Also, Morehouse did not deny making the statements attributed to him by Arno in their April 19, 1991 telephone conversation.

The Supervisory Status of William Henry

Between the testimony of William Henry and his affidavit given to a Board agent on May 30, 1991, it appears that at the time of the hearing Henry had been employed by the Respondent as a ''layout man, a welder'' at CBI Steel, Inc. in Potsdam, New York, for about 3 years. His overall supervisor was Michael Bisnett, but his immediate supervisor was Steven Hall, the foreman. After Hall was diagnosed with a brain tumor in January 1991 and began to appear for work only once or twice a week, in late February 1991 Henry asked Bisnett if he could fill in for Hall during his absences and Bisnett told him that he would think this over. Subsequently in mid-March 1991 Bisnett agreed to this and instructed Henry to basically do what Hall did whenever Hall was out, ''scheduling and stuff like that . . . keeping the men busy and making sure everything got shipped out properly and the basics.'' According to Henry, while Bisnett was not specific about the duties he was assuming, he told Henry that Henry would not have Hall's authority such as ''hire and fire, things like that.'' Henry remained as an hourly paid employee and received no increase in salary for his newly assumed duties, used Hall's office to perform this work and discontinued his regular duties as a welder.

Moreover, Henry asserted that he had no authority to hire, fire, or discipline employees, assign overtime work, schedule employee vacations, or evaluate employees. Henry attended no management meetings and only commenced using the front parking area reserved for management in the summer of 1991, after he had been permanently made Hall's assistant and at which time he was placed on salary rather than an hourly wage. Additionally, according to Henry's affidavit, the Respondent did not notify the employees at CBI Steel by posted notice or verbally that Henry was ''filling in for Hall'' during his absences and Henry said nothing about this to these employees as to what his authority and duties were, including his lack of authority to discipline them.

Harold Bush, a laborer who worked at CBI Steel, testified that when Henry assumed Hall's duties as supervisor in late February or early March 1991, during Hall's absences, Henry assigned work to employees, granted time off on occasion with Michael Bisnett's approval, warned an employee not to leave work early, answered employees' work questions, assigned overtime work, kept the employees time records and checked the hours thereon, and employees contacted Henry if they were out sick or had any grievances. Also, newly hired employees at CBI Steel reported to Henry. Bush stated:

> Well, as far as I'm concerned . . . he was pretty much in charge then. But he went back to Steve Hall for advice and stuff. But as far as I'm concerned, he was the foreman then.

On cross-examination, Bush admitted being unsure as to whether Henry actually performed some of the above duties he attributed to Henry, such as granting time off, assigning overtime work, and scheduling vacations, but Bush maintained that Henry did assign work to the employees and was considered by Bush to be his supervisor when Hall was absent. Moreover, in an affidavit given to a Board agent on April 23, 1991, Bush stated that he had no knowledge of Henry ever sending any employee home early.

Michael Bisnett testified that while Henry did convey job and overtime assignments to employees, it was Bisnett himself who designated the recipient employees. Bisnett acknowledged that Henry kept the employee time records and checked their accuracy. Bisnett also testified that when he was on vacation and Hall was out there was ''nobody in charge'' over the 15–18 employees at CBI Steel because each employee knew his job and what he was supposed to do. As noted hereinbefore, I found Michael Bisnett's testimony to be evasive and at times belligerent during questioning by counsel for the General Counsel, especially during his testimony regarding Henry's supervisory status.

[18] Interestingly, counsel for the Respondent asked Morehouse if after this conversation Morehouse had begun to assign more work to Arno because he was now in favor of the Union, to which Morehouse responded that he had not assigned more work to Arno ever, and that he believed Arno to be against the Union. There is no allegation in the complaint alleging any such violation or in the brief of the General Counsel.

Moreover, Mark Rood, who also worked with Henry at CBI Steel, testified that when Henry was circulating the petition in late February 1991, Henry was not a supervisor nor did he perform any supervisory duties. Rood related that Henry became a supervisor sometime after Rood was terminated on March 1, 1991. Rood added that while he was employed at CBI Steel and Hall was out because of illness, Ned Potts, Steve Burdick, or Henry performed Hall's duties.

The Supervisory Status of Edward (Ned) Potts

Edwards Potts is employed by the Respondent at CBI Steel, Inc. as a fabrication engineer. Potts was alleged to be a supervisor under Section 2(11) of the Act and an agent of the Respondent under Section 2(13) of the Act in the complaint and the Respondent's answer admitted this allegation. However, at the hearing the Respondent's counsel moved to amend its answer to deny this allegation.

Potts testified that he works in the ''fabrication part of the business,'' receiving drawings from architectural firms, putting out bids, contacting owners, or general contractors and, when projects are obtained, Potts handles the financing and the purchase of materials. Potts and Bisnett decide job priority when there are several projects to be worked on. Potts also develops job estimates and prepares and negotiates the contracts for the work to be done, manages the projects when the job is won, purchases materials, commits the credit of the Respondent for purchases, and directs the work of a draftsman hired by the Respondent on Potts' recommendation. Potts has his own office, is on salary with bonuses, and earns more than any of the employes or supervisors except for the Respondent's owners. Nonsupervisory employees are paid on an hourly wage basis. Potts also parks his car in an area reserved for other management employees. Potts stated that on occasion when Foreman Hall has been absent, Potts has directed the work of the employees at CBI Steel. Additionally, Potts was not eligible to vote in the Board election. Furthermore, Potts denied that he hires or fires, disciplines, or evaluates employees or tells them what to do. Moreover, Potts does not attend any of the management meetings.

B. *Analysis and Conclusions*

Section 8(a)(1) of the Act provides that it shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their statutory right to engage in or refrain from engaging in concerted activity. This provision is modified, however, by Section 8(c) of the Act, which defines and implements the first amendment right of free speech in the context of labor relations.[19] Section 8(c) permits employers to express ''any views, arguments or opinions'' concerning union representation without running afoul of Section 8(a)(1) if the expression ''contains no threat of reprisal or force or promise of benefit.''[20] The employer is also free to express opinions or make predictions, reasonably based in fact, about the possible effects of unionization on its company.[21] In determining whether questioned statements are permissible under Section 8(c), the statements must be considered in the context in which they were made and in view of the totality of the employer's conduct.[22] Also recognized must be the economically dependent relationship of the employees to the employer and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.[23]

1. Interrogation

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act when its supervisor, Lawrence Whitton, interrogated employees concerning their union activities and the union activities of other employees on February 17, 1991,[24] and by written survey on February 4, 1991. The Respondent denies these allegations.

a. *By Lawrence Whitton*

According to the testimony of Guiles and Prashaw, which I credit,[25] on January 18, 1991, while Guiles, Law, and Prashaw were at work, their supervisor, Lawrence Whitton, asked them if a union representative had been at the facility and whether they had signed union authorization cards. After Guiles and Law acknowledged that a union representative had spoken to them at work the previous day and that they had all signed authorization cards for the Union, Whitton told them that they might have to be docked one-half hour to 1 hour's pay because they had talked to the Union's representative on ''company time.''

In *Rossmore House*, 269 NLRB 1176 (1984), affd. 760 F.2d 1006 (9th Cir. 1985), the Board reiterated the basic test for evaluating whether interrogations violate Section 8(a)(1) of the Act established in *Blue Flash Express*, 109 NLRB 591 (1954): whether under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act. The Board then stated in *Rossmore House*, supra at 1177:

> Our view is consonant with that expressed by the Seventh Circuit Court of Appeals in *Midwest Stock Exchange v. NLRB* [635 F.2d l255, l267 (7th Cir. 1980)]:
>
> > It is well established that interrogation of employees is not illegal per se. Section 8(a)(l) of the Act prohibits employers only from activity which in some manner tends to restrain, coerce or interfere with employee rights. To fall within the ambit of

[19] *NLRB v. Four Winds Industries*, 530 F.2d 75 (9th Cir. 1976). Also see *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969).

[20] *NLRB v. Marine World USA*, 611 F.2d 1274 (9th Cir. 1980); *NLRB v. Raytheon Co*., 445 F.2d 272 (9th Cir. 1971).

[21] *NLRB v. Gissel Packing Co*., supra at 618.

[22] *NLRB v. Marine World USA*, supra; *NLRB v. Lenkurt Electric Co*., 438 F.2d 1102 (9th Cir. 1971).

[23] *NLRB v. Gissel Packing Co*., supra at 6l7; *NLRB v. Marine World USA*, supra.

[24] The record evidence shows that this conversation occurred on January 18, 1991.

[25] Guiles was still employed by the Respondent at the time of the hearing and his testimony, apparently adverse to the Respondent on this issue, is entitled to additional weight and supports his credibility. *Georgia Rug Mill*, 131 NLRB 1304 fn. 2 (1961). Moreover, the Respondent's failure to call Whitton as a witness to refute the testimony of Guiles and Prashaw as to this, without explanation, allows an inference to be drawn that his testimony would be unfavorable to the Respondent. *7-Eleven Food Store*, 257 NLRB 108 (1981), and cases cited therein. Moreover, Prashaw's testimony regarding the employees' conversation with Whitton on January l8, 1991 was similar to Guiles' in most relevant aspects.

> Section 8(a)(1), either the words themselves or the context in which they are used must suggest an element of coercion or interference.

Thus, the circumstances of the questioning determines its unlawfulness.

In this case neither Guiles, Law, or Prashaw were open and active supporters of the Union at the time Whitton questioned them about their union activities, since it was not until a few days later that the Union notified the Respondent that these three employees had signed union authorization cards and were designated union committeemen. It is reasonable to assume that when Carlin turned his union authorization card over to Whitton to report union activity at the Respondent's facility he identified Guiles as the employee who gave him the card and that this brought on Whitton's interrogation of Guiles, Law, and Prashaw as to the presence of a union representative on the premises and whether or not they had signed authorization cards for the Union. It is my belief that, without more, this would be enough to constitute unlawful interrogation in violation of Section 8(a)(1) of the Act, since Whitton's questioning of these employees did not occur in the context of a ''casual'' and ''friendly'' conversation, was limited solely and precisely to the employes interplay with the Union, was made by the employees supervisor at work and during worktime, involved the direct disclosure of their union activities, and none of these employes was a self-proclaimed union adherent.[26]

However, in this case, Whitton added an extra element when, after being told by Guiles and Law that they had spoken to a union representative at the facility and had signed union authorization cards including Prashaw, he advised them that they might be docked part of their pay for the time spent in conversation with the Union's representative at the Respondent's facility, which under the circumstances then present could reasonably be construed as a threat of punishment for their now disclosed union activities, including their signing union authorization cards.[27] Moreover, Whitton's subsequent declaration, upon Bruno's direction, that these employees would not lose any pay, without any further explanation, does not remedy the Respondent's unlawful interrogation. This could reasonably be construed as an act to curry favor with these employees to entice them away from supporting the Union, in view of Whitton's also advising them that Bruno wanted to now meet personally with these employees after their prior request for such a meeting with Bruno had brought no results.

From the above, I find and conclude that under all the circumstances present in this case, the Respondent's interrogation of these employees through Whitton, was unlawful and violative of Section 8(a)(1) of the Act because it reasonably tended to restrain, coerce, and interfere with their rights guaranteed under the Act.[28]

b. *By written survey*

At an ''extremely important'' meeting with employees on February 4, 1991, employee attendance being required and paid for as worktime, two of the Respondent's owners, Bruno and ''Skip'' Bisnett Jr., informed the employees that the Respondent recognized that it had employee relations problems and in order to ''find out which area they had to look more into,'' they distributed an ''Evaluation of Management Questionaire'' to the employees. While most of the questions were work related, question 43 asked for the employees feelings about union representation.

As indicated above, the Board's test for evaluating whether a interrogation violates Section 8(a)(1) of the Act is whether under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed employees under the Act.[29] In *Weather Shield of Connecticut*, 300 NLRB 93 (1990), the administrative law judge held, with Board approval, that a survey of its employees by the employer regarding ''wages, working conditions and 'questions of that nature''' violated Section 8(a)(1) of the Act because the employer had ''never previously conducted such a survey among its employees and as it took place so close to the election,'' and the judge assumed that its purpose was to interfere with the employees free choice in the upcoming election, citing, *Electric Hose & Rubber Co*., 267 NLRB 488 (1983); *Varco Inc*., 216 NLRB 1 (1974). While all these cases involved the unlawful solicitation of grievances it seems applicable as well on this issue.

In the instant case as in *Weather Shield*, the Respondent had never previously conducted such a survey, it was conducted after the Respondent became aware that the Union was engaged in organizing its employees, was introduced and explained as to purpose by two of the Respondent's owners and distributed at a special important meeting with employees, took place comparatively close to the election, and, most importantly, the survey included a question regarding the employees union sympathies. Since the survey was distributed during the Union's organizational campaign, it cannot be said to be unrelated to union activity. Moreover, the survey also constituted an unlawful solicitation of employee grievances with its implied promises of redress in violation of Section 8(a)(1) of the Act, as will be more fully discussed hereinafter.[30] Additionally, while the questionnaire noted that it was not to be signed or necessary to be completed, the questionnaire was color coded as to department and a number appearing thereon may have also helped to pinpoint the particular employees department affecting its anonymity, and the Respondent failed to give employees assurances against reprisals for failure to complete the questionnaire or, if completed, based on its contents.[31]

From the above, I find and conclude that under all the circumstances present in this case, the Respondent's interrogation of its employees by written survey was unlawful and violated Section 8(a)(1) of the Act because it reasonably

[26] *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985); *Rossmore House*, supra. Also see *Advance Waste Systems*, 306 NLRB 1020 (1992).

[27] *Basin Frozen Foods*, 307 NLRB 1406 (1992) (although a different type of implied threat was involved here). I also reject the Respondent's argument in its brief that Whitton's remarks were not unlawful because ''an employer is not precluded from regulating employee use of its property,'' especially in light of Whitton's interrogation of the employees as to their having signed union authorization cards in the same conversation.

[28] *Rossmore House*, supra; *Sunnyvale Medical Clinic*, supra.

[29] *Rossmore House*, supra.

[30] *Varco Inc*., 216 NLRB 1 (1974).

[31] *Gordonsville Industries*, 252 NLRB 563 (1980).

tended to restrain, coerce, and interfere with their rights guaranteed under the Act.[32]

2. Solicitation of grievances

The complaint alleges that the Respondent, by James Bruno on January 24, 1991, by written survey on February 4, 1991, and by Edwin Ricker on February l5, 1991, solicited grievances from its employees with explicit and implicit promises to rectify them in violation of Section 8(a)(1) of the Act. The Respondent denies these allegations.

a. *By James Bruno*

The credited testimony of Guiles shows that on January 24, 1991, Bruno met with employees Guiles and Law wherein these employees complained about not having received any raises since their hire several months before, and requested additional hours of work to increase their salaries. Such a meeting had been requested by Guiles and Law and two other employees, Prashaw and Carlin, about 3 weeks before through their supervisor, Whitton, but according to Bruno could not be arranged until January 24, 1991, because Bruno was busy. Since Prashaw wasn't present at this meeting, Guiles and Law also complained about Prashaw, part of whose work they were consistently being obliged to perform, and they suggested the possibility of taking over Prashaw's truck route to supplement their pay. The record evidence also discloses that this meeting occurred after the Union had begun its organizing campaign in early January 1991, although the employees request for it was made earlier, and took place soon after Bruno became aware on January 18, 1991, that Guiles, Law, and Prashaw had signed union authorization cards and also learned on January 22, 1991, that these employees had been designated by the Union as ''committee people.'' At this meeting Bruno explained the Respondent's policy of evaluating new employees for purposes of salary increases after they had been employed for 6 months, and when he was apprised that Guiles and Law had worked for the Respondent for 10 and 7 months, respectively, without such evaluation, Bruno said he would look into this. Additionally, after they had discussed the feasibility of dividing Prashaw's truck route between Guiles and Law, with Bruno taking notes thereon, Bruno told them that he had decided to give them Prashaw's route. That very same day Guiles and Law were granted 50-cent-an-hour wage increases by the Respondent and on January 28, 1991, Prashaw's truck route was reassigned to Guiles and Law and Prashaw was terminated.

In *Reliance Electric Co*, 191 NLRB 44, 46 (1971), the Board stated:

> Where, as here, an employer, who has not previously had a practice of soliciting employee grievances or complaints, adopts such a course when unions engage in organizational campaigns seeking to represent employees, we think there is a compelling inference that he is implicitly promising to correct these inequities he discovers as a result of his inquiries and likewise urging on his employees that the combined program of inquiry and correction will make union representation unnecessary.

Furthermore, in *Varco, Inc*., 216 NLRB 1 (1974), the Board, on reference to this holding in *Reliance Electric Co*., supra, stated:

> Thus the Board has found unlawful interference with employee rights by an employer's solicitation of grievance during an organizational campaign although the employer merely stated it would look into or review the problem but did not commit itself to specific corrective action; the Board reasoned that employees would tend to anticipate improved conditions of employment which might make union representation unnecessary. However, it is not the solicitation of grievances itself that is coercive and violative of Section 8(a)(1), but the promise to correct grievances or a concurrent interrogation or polling about union sympathies that is unlawful; the solicitation of grievances merely raises an inference that the employer is making such a promise, which inference is rebuttable by the employer.

In the instant case no evidence was presented to show that the Respondent had a practice of meeting with employees personally, especially at the ownership level,[33] either at their own request or otherwise to hear their complaints or grievances.[34] Additionally, the employees' request to meet with Bruno, brought to his attention by their supervisor Whitton on several occasions prior to the advent of the Union, was not acted upon until after Bruno learned about their union activity. The timing of this meeting also takes on significance in that while Bruno could not fit a meeting with those employees into his schedule although requested to do so by Whitton, ''a couple of times,'' upon his being apprised of their union activities he immediately arranged for such a meeting. Moreover, Bruno actually agreed to remedy their grievances at this very meeting.

From all of the above, I find and conclude that the Respondent violated Section 8(a)(1) of the Act by soliciting grievances from its employees with explicit and implicit promises to rectify them.[35]

b. *By written survey*

An unprecedented inquiry concerning employee grievances engaged in during a union organizational campaign raises a compelling inference that an employer ''is implicitly promising to correct those inequities he discovers as a result of his inquiries and likewise urging on his employees that the combined program of inquiry and correction will make union representation unnecessary.''[36] In the instant case the Respondent had never conducted such a survey before, it took place during the Union's organizational campaign and this timing plus the question contained therein regarding the employees union sympathies suggests that it constituted a precipitant reaction to union activity.[37] Moreover, Bruno and/or ''Skip'' Bisnett, Jr. indicated that the purpose of the questionnaire was to get an idea as to their standing with their

[32] *Rossmore House*, supra; *Gordonsville Industries*, supra.

[33] *Vinyl-Fab Industries*, 265 NLRB 1097 (1983).

[34] *Purolator Armored*, 268 NLRB 1268 (1984).

[35] *Purolator Armored*, supra; *Vinyl-Fab Industries*, supra *Reliance Electric Co.*, supra. Also see *General Electric Co.*, 264 NLRB 953 (1982).

[36] *Reliance Electric Co*., supra.

[37] *Keystone Lamp Mfg. Corp*., 284 NLRB 626 (1987).

employees and as to ''which areas they had to look more into.'' I therefore find and conclude that the purpose of this survey was to interfere with the employees free choice in the upcoming election and therefore violates Section 8(a)(l) of the Act.[38]

c. *By Edwin Ricker*

At another ''important employee meeting'' requiring paid for employee attendance, held at Uncle Max's Restaurant on February 15, 1991, to ''up-date'' what was happening regarding the Respondent and the Union, Bruno advised the employees that the results of the questionaire had been obtained and that the Respondent had realized that problems existed and had hired a labor consultant, Edwin Ricker, to straighten out things between employees and management. Ricker was then introduced and took over the meeting. Ricker discussed the Board's election procedure, and the Teamsters Union's involvement with organized crime. Ricker also spoke about programs the Respondent would like to initiate but could not because of the Union's representation petition and the coming Board election, such as, an employees relations program including a grievance procedure (internal dispute resolution committee), and a wage program (pay for knowledge and performance). Ricker also told the employees that the Respondent was establishing a ''hot-line'' program in which forms would be available to employes to write in questions regarding their concerns about employee problems and about what the Union and the Respondent were saying during the organizational campaign.

The solicitation of grievances at preelection meetings, especially where an employer has not had a practice of soliciting employee grievances or complaints before, carries with it an inference that the employer is implicitly promising to correct these inequities it discovers as a result of its inquiries.[39] this is true even though the employer merely stated it would look into or review the problems but did not commit itself to corrective action.[40] However, this inference is rebuttable.[41]

In the instant case, the Respondent, through Ricker, at the very least, left the impression that, by bringing their complaints and grievances directly to the Respondent either by means of the survey, questions elicited at the meeting, or by the ''hot-line forms initiated by it, the employees complaints or grievances would be remedied. Ricker spoke about new programs to be instituted, a grievance resolution procedure and wage initiative, which might well be implemented if the Union was unsuccessful in its organizing campaign and the election. Ricker's reference to ways of making the work environment better without going union, after explaining the new proposed grievance procedure and wage proposal, would not be lost on the employees present, as an indication by the Respondent that it would redress their grievances and complaints making union representation unnecessary.[42] Moreover, Ricker's statement to the gathered employees that if the employees did not vote the Union in and were not pleased with what the Respondent did, they then could get the Union back in 6 months, certainly reinforces the above inference of promised redress for employee grievances and complaints by the Respondent if the Union lost the election.

From the above, I find and conclude that the Respondent violated Section 8(a)(1) of the Act by soliciting grievances from its employees with explicit and implicit promises to rectify them.[43]

The complaint also alleges that the Respondent by Edwin Ricker violated Section 8(a)(1) of the Act by informing its employees that if the Union lost the election it would set up a grievance procedure. The Respondent denies this allegation.

Mark Rood testified that at the meeting on February 15, 1991, while Ricker made no promises directly to the employees, he did say that it was possible that various programs he had mentioned including a grievance resolution procedure might be instituted if the Union failed in its quest to represent the Respondent's employees. Ricker denied making any promises to employees at this meeting but did not specifically deny making this statement attributed to him. I therefore credit Rood's testimony on this issue. While couched in language suggesting a possibility rather than an actuality, it appears to be no less an implied promise of a benefit conditioned upon the rejection of the Union. Moreover, this meeting was admittedly held with employees because of the advent of the Union's organizing campaign thus the timing and impact of such a statement cannot be ignored.

In *NLRB v. Crown Can Co*., 138 F.2d 263, 267 (8th Cir. 1943), cert. denied 321 U.S. 769 (1944), the United States Court of Appeals for the Ninth Circuit (citing *Western Cartridge Co. v NLRB*, 134 F.2d 240, 244, cert. denied 320 U.S. 746 (1943), stated that ''interference is no less interference because it is accomplished through allurement rather than coercion.'' I therefore find and conclude that the Respondent violated Section 8(a)(1) of the Act when it informed its employees that if the Union lost the election it would set up a grievance procedure.[44]

3. The petition

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act when Edwin Ricker suggested to its employees on February 15, 1991, that they could draw up a petition against the Union, and when William Henry and Michael Bisnett solicited its employees to sign such a petition against the Union. The Respondent denies these allegations.

a. *By Edwin Ricker*

As more particularly set forth hereinbefore, at a meeting with employees on February 15, 1991, at Uncle Max's Restaurant, Edwin Ricker, in response to an employee's question as to how to prevent the Union from coming in, answered that the employees could initiate a petition against union representation, to be presented to the Union after a majority of the employees signed it, hopefully resulting in the Union's withdrawing from the election.

[38] *Weather Shield of Connecticut*, supra, *Keystone Lamp Mfg. Corp*., supra; *Reliance Electric Co*., supra, Contrast *Electric Hose Co*., 267 NLRB 488 (1983), enfd. in part and denied in part 731 F.2d 1384 (9th Cir. 1984).

[39] *Reliance Electrical Co*., supra.

[40] *Varco Inc*., supra.

[41] Ibid.

[42] *Vinyl-Fab Industries*, supra.

[43] *Electric Hose Co*., supra; *Vinyl-Fab Industries*, supra.

[44] See for example *Pennsy Supply*, 295 NLRB 324 (1989); *C-F Air Freight*, 247 NLRB 403 (1980).

Under Section 8(c) of the Act, an employer may lawfully furnish accurate information, especially in response to employees' questions, if it does so without making threats or promises of benefits.[45]

The evidence herein shows that the February 15, 1991 meeting was called by the Respondent for the purpose of advising employees as to what was going on regarding the Union's organizing campaign and the Respondent's response to it. Ricker made reference to the Union's parent organization, Teamsters Union, being involved with organized crime and its engagement in illegal activities such as skimming moneys from retirement programs of union members, and its alleged lack of interest in its membership, all to discredit the Union. Moreover, as found above, at this same meeting Ricker engaged in the unlawful solicitation of grievances and unlawfully informed the employees that if the Union lost the election the Respondent would implement a grievance procedure among other things. Under these circumstances it can be said that Ricker's suggestion of an employee petition against the Union, reasonably tended to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 7 of the Act and that the Respondent thereby violated Section 8(a)(1) of the Act.[46]

b. *By William Henry and Michael Bisnett*

A petition against the Union was prepared and circulated for signatures among the Respondent's employees by William Henry, employed by the Respondent at CBI Steel, Inc. Henry admitted preparing such a petition because of Ricker's suggestion of it at the February 15, 1991 meeting and Henry's own conversations with fellow employees. The testimony of Henry and Michael Bisnett concerning the circumstances surrounding the circulation of this petition and that of the other witnesses for the General Counsel shows significant contradiction and requires a resolution of the question of their credibility. In making my credibility determinations, I have carefully considered the record evidence, my observation of the demeanor of the witnesses, the weight of the respective evidence, established and admitted facts, inherent probabilities and reasonable inferences which may be drawn from the record as a whole.[47] Moreover, in the context of determining credibility, this would also have some bearing on the issue of Henry's status as a supervisor under Section 2(11) of the Act and as an agent of the Respondent under Section 2(13) of the Act as alleged in the complaint and denied by the Respondent.

Henry's testimony as to when he started circulating the petition against the Union and his statement about this in his affidavit is clearly contradictory. Henry testified at first that he had prepared the petition and began obtaining employee signatures thereon about 2–3 weeks after the February 15, 1991 meeting or in or about mid-March 1991. In his affidavit, Henry states that this occurred ''around the last week in March, 1991,'' and having obtained about 35 signatures during that week, he then mailed the petition to the Union around April 1, 1991. Henry's explanation for this discrepancy, that the information in his affidavit was not obtained by the Board agent through questioning, that he was not read the affidavit by the Board agent before he initialed each page and signed the statement at its end and acknowledged the truth of the statements made therein, and the implication that the Board agent either mistakenly or purposely recorded his statements inaccurately, plus other evidence in the record which challenges his believability and veracity, leads me to believe that Henry tempered his testimony to favor the Respondent and enhance its positions herein opposing the allegations against it of conduct violative of Section 8(a)(1) of the Act involving this petition, and to conclude that he is a less than reliable witness.

For example, Rood testified that following the February 15, 1991 meeting at Uncle Max's Restaurant he became aware that a petition against the Union was being circulated by Henry at CBI Steel. Henry asked him to sign the petition on February 25, 1991, which Rood refused to do, but Rood did sign it the next day, February 26, 1991. Rood was terminated on March 1, 1991. This testimony was not denied by Henry or refuted by any other evidence in the record and strongly contradicts Henry's testimony that he prepared and circulated the petition beginning in either mid-March or the end of March 1991. It would seem incredible that Rood would return to CBI Steel after being terminated on March 1, 1991, to sign the petition thereafter. Moreover, the same is true of Verde Snyder who testified uncontradictedly, that he had been sarcastically asked by Henry to sign the petition prior to his layoff by the Respondent on February 25, 1991. Snyder was not rehired until July 1, 1991. Additionally, Richard Walrath testified that 1 week before his termination on March 1, 1991 he was asked by Henry to sign the petition but refused to do so.

Additionally, employee Harold Bush's testimony that in late February or early March 1991, Henry asked him to sign the petition against the Union also supports discrediting Henry's testimony regarding it.[48] It thus appears from the record evidence that Henry prepared the petition against the Union in late February 1991 and circulated it for employees signatures during the critical period before the election, the interval from the date of the Union's filing of its representa-

[45] *Eagle Comtronics*, 263 NLRB 515 (1982).

[46] *Fabric Warehouse*, 294 NLRB 189 (1989), enfd. mem. sub nom. *Hancock Fabrics v. NLRB*, 902 F.2d 28 (4th Cir. 1990). Also compare and contrast, *Lee Lumber & Building Material Corp.*, 306 NLRB 9 (1992). Moreover, in *NLRB v. Grossinger's Inc*., 372 F.2d 26 (2d Cir. 1967), the United States Court of Appeals, Second Circuit held that the employers suggestion to employees that they withdraw their union affiliation by petition, its assistance in preparing the petition and permitting the petition to be circulated for signatures on company time and property violated Section 8(a)(1) of the Act.

[47] *Parkview Furniture Mfg. Co*., 284 NLRB 947 (1987); *Gold Standard Enterprises*, 234 NLRB 618 (1978); *V & W Castings*, 23l NLRB 912 (1977); *Northridge Knitting Mills*, 223 NLRB 230 (1976).

[48] At the time Bush testified herein, he was still employed by the Respondent and his testimony seemingly adverse to the Respondent, is entitled to additional weight in support of credibility. *Georgia Rug Mill*, supra. I am not unaware that Bush's testimony regarding Henry's assumption of supervisor Hall's duties as it affects Henry's supervisory status contained discrepancies but these appeared to be based on Bush's perception that when Henry took over Hall's duties he became Bush's supervisor in Hall's stead and assumed all of Hall's duties when Hall was absent, as will be more fully set forth hereinafter.

tion petition with the Board on February 4, 1991, until the Board election on April 5, 1991.[49]

Other examples abound in the record as well. At the hearing Henry testified that he solicited employee signatures on the petition at all the Respondent's facilities, yet in his affidavit he states that ''he approached all employees in the shop [CBI Steel] and not employees of WSM. I did go to Parishville with it.'' Henry also testified that he solicited and obtained employee signatures on the petition after work hours and not on ''company time,'' with employees at Parishville signing the petition in the facility parking lot. Additionally, Henry in his affidavit states:

> When circulating the petition I was always on my own time—never on the clock or work time; at no time did any Company official or supervisor provide me with a list of employees to assist me in circulating the petition. I never showed the petition to Mike Bisnett nor any Company official or supervisor. I never told Mr. Bisnett nor any Company official or supervisor who had or had not signed the petition.

However, Verde Snyder testified that he observed Henry obtain Frank Snyder's signature on the petition during working hours but after their supervisor, Robert Dalton, had left for the day, and also observed that Henry had in his possession what looked like a ''computer printout that he had gotten from the company, with all the employees names,'' and Henry was marking this list as employees signed the petition.

Moreover, Bush testified that about 5 minutes after he signed the petition which was lying on Henry's work table, Michael Bisnett came over, put his arms around Bush and thanked him for signing it. Bush also testified that he had observed another employee sign this petition after which he saw Henry and Bisnett pointing at this employee with the petition being held in either Henry or Bisnett's hand. Bush added that since Henry had told him that management would not know who had signed the petition he asked Henry about this, reminding Henry of what he had said and Henry told him that since Bush had already signed the petition why should he care about any disclosure.

Bisnett admitted being aware of what Henry was doing vis a vis the petition but denied encouraging him to do this or playing any part in its preparation or circulation. Bisnett also admitted thanking Bush for signing the petition since he had seen it laying on Henry's desk with the signatures thereon. Bisnett did deny reviewing the list of signatures with Henry or their pointing out any employee who had signed the petition. Also, Richard Walrath testified that when he refused to sign the petition 1 week before he was terminated, he observed the employee who had asked him to sign it (it could only have been Henry), place a mark by his name on a list of employees in his possession.

For the reasons set forth hereinbefore, I credit the testimony of Bush, Verde Snyder, Mark Rood, and Walrath, although the latter three are discriminatees herein, over that of Henry and Bisnett on this issue since they testified in a forthright manner, their testimony was consistent with each other's and importantly consistent with other evidence in the record. In contrast, as noted hereinbefore, Henry's testimony was discredited as being tailored to assist the Respondent in this case and Bisnett testified in an evasive manner on the issue of Henry's supervisory status and exhibited a hostile and belligerent attitude towards counsel for the General Counsel on cross-examination which was totally unwarranted.

It is a violation of Section 8(a)(1) of the Act for an employer to sponsor and participate in the circulation of a petition among employees withdrawing support from a union.[50] An employer's participation in such a petition violates Section 8(a)(1) because it ''tends to be coercive or tends to interfere with the employees' exercise of their rights.[51] In *Indiana Cal-Pro, Inc. v. NLRB*, 863 F.2d 1292 (6th Cir. 1988), the United States Court of Appeals, Sixth Circuit found the employers participation in drafting and circulating a petition among employees withdrawing support from a union to be coercive where a plant superintendent drafted the petition, was present when several of the employees signed it, and the plant superintendent signed the petition himself.

Since William Henry prepared the petition in the instant case and circulated it for employee signatures, also presumably signing it himself, a consideration of his status as a supervisor and/or as an agent of the Respondent is required.

Section 2(11) of the Act provides:

> The term ''supervisor'' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

In enacting Section 2(11), congress emphasized its intention that only truly supervisory personnel vested with ''genuine management prerogatives'' should be considered supervisors, and not ''straw bosses, leadmen, set-up men and other minor supervisory employees.''[52] However, consistent with the statutory language and legislative intent, it is well recognized that Section 2(11)'s disjunctive listing of supervisory indicia does not alter the essential conjunctive requirement that a supervisor must exercise independent judgment in performing the enumerated functions.[53] As the court stated in *Beverly Enterprises v. NLRB*, 661 F.2d 1095, 1098 (6th Cir. 1981): ''[R]egardless of the specific kind of supervisory authority at issue, its exercise must involve the use of true independent judgment in the employer's interest before such exercise of authority becomes that of a supervisor.'' Thus, it is well settled that the exercise of merely routine or clerical authority does not give an individual the status of supervisor; ''the test must be the significance of his judgment and directions.''[54] Consequently, an employee does not become a supervisor

[49] *Goodyear Tire Co.*, 138 NLRB 453 (1962).

[50] *NLRB v. Allen's I.G.A. Foodliner*, 651 F.2d 438 (6th Cir. 1981).

[51] *Okum Bros. Shoe Store*, 825 F.2d 102 (6th Cir. 1988).

[52] 5 Rep. No. 105, 80th Cong., 1st sess. 4 (1947).

[53] *NLRB v. Wilson-Crissman Cadillac*, 659 F.2d 728 (6th Cir. 1981); *City Yellow Cab Co.*, 344 F.2d 575 (6th Cir. 1965).

[54] *NLRB v. Wilson-Crissman Cadillac*, supra; *Hydro Conduit Corp.*, 254 NLRB 433 (1981); *Federal Compress & Warehouse Co. v. NLRB*, 398 F.2d 631 (6th Cir. 1968).

merely because he gives some instructions or minor orders to other employees.[55] Nor does an employee become a supervisor because he has greater skills and job responsibilities or more duties than his fellow employees.[56] Additionally, the existence of independent judgment alone will not suffice for, ''the decisive question is whether [the employee has] been found to possess authority to use independent judgment with respect to the exercise . . . of some one or more of the specific authorities listed in Section 2(11) of the Act.[57] In short, ''some kinship to management, some empathetic relationship between employer and employee must exist before the latter becomes a supervisor for the former.''[58] Moreover, in connection with the authority to recommend actions, Section 2(11) of the Act requires that the recommendations must be effective. The burden of proving that an employee is a ''supervisor'' within the meaning of the Act rests on the party alleging that such status exists.[59]

The record evidence shows that Henry had no authority to hire, fire, suspend, lay off, recall, discharge, reward, or even discipline employees.[60] While the foreman, Hall, had such authority, at least as far as effectively recommending such action, or directly with regard to some of the above, in this instance I credit the testimony of Henry and Bisnett only to the effect that although Henry did assume Hall's duties, he was also restricted by Bisnett as to his exercising any of the above authority, since this is supported by other evidence in the record.[61]

However, the Board also considers ''secondary indicia'' in determining whether an individual is a supervisor. The evidence herein shows that while Henry assigned jobs to the fab shop employees in most instances Bisnett and even Potts gave Henry the assignments, and while Henry assigned overtime work to employees, Bisnett made the decision for the need for overtime and whom to assign it to. Although Henry exercised some direction-of-work authority in carrying out his duties, the General Counsel failed to establish that Henry used independent judgment in exercising his limited authority. Moreover, Henry maintained the timecards and checked the employees hours thereon. No independent judgment was required to correct any oversights. There is no evidence that Henry had the authority to grant time off to employees unless he checked with Bisnett or Hall first, and his giving permission for vacation time was based on a schedule already set by Hall or with Hall's approval.

Additionally, Henry used Hall's office in performing his duties and while doing so discontinued his work as a welder. This in and of itself is insufficient to designate Henry as a supervisor. While Henry received a higher hourly salary than many of the other employees in the shop, this appears to be due to his previous higher skilled work or seniority since another nonsupervisory employee, Steve Burdick, received a slightly higher hourly wage than Henry and in February 1991 had also filled in for Hall as foreman when Hall was absent. It should be noted that Hall was salaried while Henry received an hourly wage and when Henry assumed Hall's duties he received no increase in pay. As regards Henry's parking privileges, I am unsure as to when he started parking his automobile at the front of the facility where management parked their cars or stopped parking in the rear with the other employees, since Bush was unsure of dates and Henry did become Hall's full-time assistant in the summer of 1991 as a salaried employee with such parking rights and with authority to act in areas which might well establish him as a supervisor under the Act at that time. Also Henry attended no managerial meetings in February or March 1991. Thus most of Henry's other duties were clerical in nature and required no independent judgment.

For the above, I find and conclude that the General Counsel has not met his burden of establishing that Henry was a supervisor within the meaning of Section 2(11) of the Act. In examining the incidents alleged to show that Henry was responsible for directing the fab shop employees, I find that the evidence fails to establish that the authority exercised was anything more than strictly routine or that it involved the use of independent judgment. At most the evidence shows that any authority he exercised was performed in a routine manner. Such conduct is insufficient to establish supervisory status under the Act.[62]

However, even if the evidence in this case does not establish supervisory status, it does establish that the Respondent placed Henry in a position where employees could reasonably believe that he spoke or acted on behalf of management. While the Board has held that employees belief that a fellow employee is a supervisor is not determinative of the issue of supervisory status, ''it is the actual exercise of supervisory authority, not employee belief that is determinative,''[63] the Board has frequently held that an employer may be liable for the statements and acts of nonsupervisory employees who act as its agents. It is also well settled that where an employer places a nonsupervisory employee in a position in which employees could reasonably believe he speaks or acts for management, the employer then may be responsible for the coer-

[55] *NLRB v. Wilson-Crissman Cadillac*, supra; *NLRB v. Doctors' Hospital of Modesto*, 489 F.2d 772 (9th Cir. 1973).

[56] *Federal Compress & Warehouse Co. v NLRB*, supra; *NLRB v. Merchants Police*, 313 F.2d 310 (7th Cir. 1963).

[57] *Advance Mining Group*, 260 NLRB 486 (1982); *NLRB v. Brown & Sharpe Mfg. Co.*, 169 F.2d 331 (1st Cir. 1958).

[58] *Advance Mining Group*, supra; *NLRB v. Security Guard Service*, 384 F.2d 1 (5th Cir. 1967).

[59] *RACHO, Inc.*, 265 NLRB 235 (1983); *Tucson Gas & Electric Co.*, 241 NLRB 181 (1979); *Commercial Movers*, 240 NLRB 288 (1979).

[60] Although Bush testified that Henry had the authority to discipline employees and had done so in an instance when an employee had left work early without permission and Henry had warned him not to do this again, I do not believe that this establishes that Henry had the authority to discipline employees. Henry's duties entailed assigning work to employees and to see that the work was properly done. Telling an employee not to leave work early without reporting it or seeking permission would be in line with this duty. Moreover, Bush was unsure if Henry had warned that he would write the employee up if it occurred again, and there is no other evidence in the record that Henry had the authority to impose discipline on employees himself.

[61] It is not unusual that, based on the evidence in the record, the testimony of a witness may be credited in part, while other segments thereof are discounted or disbelieved. *Jefferson National Bank*, 240 NLRB 1057 (1979), and cases cited therein. Importantly, neither the General Counsel nor the Union produced any evidence to contradict this.

[62] *Clark Machine Corp.*, 308 NLRB 555 (1992). Contrast, *Hoffman Plastic Compounds*, 306 NLRB 100 (1992).

[63] *Clark Machine Corp.*, supra.

cive acts or statements of that employee.[64] The test is ''whether, under all the circumstances, the employees would reasonably believe that the non-supervisory employee was reflecting company policy and speaking and acting for management.''[65] Moreover, the strict principles of agency are not applied in determining an employer's responsibility under the Act for the conduct of others.[66] Section 2(13) of the Act provides:

> In determining whether any person is acting as an ''agent'' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

From the evidence herein, I find and conclude that Henry was an agent of the Respondent within the meaning of Section 2(13) of the Act, when he solicited employees to sign a petition against the Union. With Michael Bisnett's authorization, Henry assumed the duties of his supervisor Hall when Hall was absent due to illness. As Hall did, Henry assigned work to the fab employees, saw that the work was performed properly and in a timely manner, answered employees questions when he could and checked with Hall when he couldn't, handled timecards, etc. Although Bisnett may have limited Henry's authority as a statutory supervisor, Bisnett never conveyed this to the employees nor did Henry. For all intents and purposes Henry was the foreman as far as the employees were concerned and they were expected to follow Henry's instructions whenever Hall was absent and when Bisnett went on vacation in March 1991. Bush unequivocally testified that he considered Henry his supervisor. Additionally Henry was allowed to use Hall's office and ceased to perform his previous welding duties. Thus the record clearly reveals that the Respondent placed Henry in a position as acting or assistant foreman where employees could reasonably believe that he spoke on behalf of management.[67]

Partly, if not totally, at the suggestion of the Respondent's labor consultant, Edwin Ricker, a supervisor and agent of the Respondent, made at the employees meeting on February 15, 1991, Henry prepared and started soliciting employee signatures on a petition against the Union in late February 1991. While it is true that Henry had not as yet assumed Hall's duties as full-time foreman when Hall was absent, Rood credibly testified that when Hall became ill in January 1991, Potts, Burdick and Henry would fill in for him on occasion. Upon Henry being assigned to perform Hall's duties as assistant to Hall full-time in mid-March 1991, he continued to circulate and solicit employee signatures until the end of March 1991, all during the critical period before the election.

Admittedly, the Respondent was aware of what Henry was doing regarding the petition against the Union and allowed him to solicit employee signatures thereon during worktime and on company property in effect outwardly encouraging and endorsing Henry's action. Supporting this is Michael Bisnett being seen with Henry with or in the vicinity of the petition pointing to an employee who had recently signed the petition, and with Bisnett thanking Bush for signing the petition with his hand around Bush's shoulders, all presumably on the workfloor in full view of any employees present. Additionally, Henry was observed with a computerized or typed list of employees, names which he marked as employees signed the petition or not, and it is reasonable to infer that he obtained such a list from the Respondent to assist his solicitation of employee signatures, for as a nonmanagerial or supervisory employee, where else would he obtain such a listing.

Furthermore, Mark Rood testified that he had signed the petition against the Union to give the impression that he was antiunion since he believed that the Respondent wanted this and to curry its favor.

From the above, I find and conclude that William Henry was an agent of the Respondent within the meaning of Section 2(13) of the Act and that the Respondent gave Henry the actual and apparent authority to solicit employee signatures on the petition against the Union. Moreover, I also find that the Respondent, through Michael Bisnett, also involved itself in the circulation of the petition and solicitation of employee signatures thereon. The suggestion for the petition came from Ricker, Bisnett was seen with Henry and the petition identifying employees signatures and the employees themselves, on the work floor, and Bisnett had thanked an employee for signing the petition although the identity of such employees was purported to be secret and to be withheld from management.

Therefore, the Respondent violated Section 8(a)(1) of the Act when it involved itself in the preparation and circulation of the petition against the Union since unit employees would understandably consider the petition as sponsored and encouraged by the Respondent and thereby tended to coerce or interfere with the employees exercise of their rights under the Act.[68]

4. Promises of wage increase and other benefits

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act by promising its employees various benefits including a grievance procedure in order to induce them to vote against the Union in the election and by promising and granting wage increases to employees in order to dissuade them from supporting the Union. The Respondent denies these allegations.

a. *By Edwin Ricker*

At the meeting with employees held on April 3, 1991, 2 days before the Board election on April 5, 1991, Edwin Ricker told employees that the survey conducted previously by the Respondent had indicated employee concerns in certain of their terms and conditions of employment and that the Respondent would like to remove these concerns by providing a new grievance procedure program (IDRC), a new wage

[64] *Tyson Foods*, 311 NLRB 552 (1993), and cases cited therein.

[65] *Community Cash Stores*, 238 NLRB 265 (1978). Also see *Technodent Corp*., 294 NLRB 924 (1989); *Futuranik Industries*, 279 NLRB 185 (1986).

[66] *Machinists v. NLRB*, 311 U.S. 72 (1940); *NLRB v. Arkansas-Louisiana Gas Co*., 333 F.2d 790 (8th Cir. 1964).

[67] *Minnesota Boxed Meats*, 282 NLRB 1208 (1987); *Broyhill Co*., 210 NLRB 288 (1974).

[68] *Davies Medical Center*, 303 NLRB 195 (1991), and cases cited therein at 207; *Indiana Cal-Pro, Inc. v. NLRB*, supra; *NLRB v. Allen's I.G.A. Foodliner*, supra; *NLRB v. S & H Grossinger's Inc*., supra.

program (PKP), a job bidding and posting procedure, better communications between the employees and management, and a revised employee handbook. Ricker advised the employes that if the Union lost the election, these programs would be implemented and if the Union won the election the Respondent would negotiate with the Union regarding these items.

The test for determining whether an employer has violated Section 8(a)(1) of the Act is whether the employer's conduct tends to be coercive or tends to interfere with the employees' exercise of their rights.[69] In making this determination the Board considers the total context in which the challenged conduct occurs and is justified in viewing the issue from the standpoint of its impact on the employees.[70]

Having previously unlawfully solicited employees' grievances by means of a written survey at the February 4, 1991 meeting with employees, the Respondent, through Ricker, now promised to remedy these grievances by presenting already developed programs (IDRC, PKP) and improved benefits to be implemented if the Union lost the election or negotiated with the Union if it won the election. Ricker's statements were not general and vague or mere responses to employee suggestions to be looked at at some indefinite future time. Moreover, the Respondent's unequivocal commitment to these programs was communicated to the employees two days before the Board's scheduled election. Even Ricker's statement that these programs and benefits would be implemented if the Union lost the election or negotiated with the Union if it won, under the circumstances present herein seems to present to the employees the choice of ''a bird in the hand or two in the bush,'' vote against the Union and your certain of these programs and benefits, vote for the Union and you face the possible uncertainty of negotiations.

Accordingly, I find and conclude that Ricker's statements conveyed at the very least an implied promise to remedy the employees grievances and thereby infringed on the employees rights under Section 7 of the Act in violation of Section 8(a)(1) of the Act.[71]

b. *By James Bruno*

On January 24, 1991, at a meeting between Bruno and employees, Michael Guiles and Edward Law, the employees asked Bruno for raises. Bruno promised to look into their request and later that same day granted each of them a 50-cent-per-hour wage increase.

In *NLRB v. Exchange Parts Co*., 375 U.S. 405, 409 (1964), the United States Supreme Court stated:

> The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. The employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.

The Board in *Marine World USA*, 236 NLRB 89, 90 (1978), held:

> It is well settled, however, that the granting of wage increases and/or benefits during the pendency of a representation proceeding, including the pendency of objections to an election, is not per se unlawful. Rather, the test is whether, based on the circumstances of each case, the granting of increased wages and benefits is calculated to impinge upon the employees' freedom of choice in an upcoming scheduled election or an election which might be directed in the future.[6] Thus, for example, the Board has found the granting of new wages and benefits during the pendency of a representation proceeding to be lawful where an employer has established that such action was consistent with past practice,[7] such action had been decided upon prior to the onset of union activity,[8] or business justifications prompted the adjustment.[9]

When the timing of a wage increase or other grant of benefits coincides with organizational activity, ''absent an affirmative showing of some legitimate business reason for the timing, it is not unreasonable to draw the inference of improper motivation and improper interference with employee freedom of choice.''[72] The burden of establishing that the timing of such increases was motivated by factors other than the union campaign or the pendency of an election is on the Respondent.[73] The burden is met where the increases are shown to be granted in accordance with an established wage program.[74]

The Respondent asserts in its memorandum brief that:

> [T]he wage increases to Guiles and Law on January 24, 1991 were motivated solely by reason of their not having been reviewed and granted the raises normally given to WSM employees following completion of their sixth month of employment. That is made more noticeable by the fact that John Carlin, one of their co-employees who like them, requested a raise on January 24, 1991, was denied the raise and told he would have to wait until the annual review given to all longer employed employees of WSM in April.

However, the record evidence does not support the Respondent's contentions.

The January 24, 1991 meeting between Bruno and employees Guiles and Law was clearly precipitated by the employees union activities. At this meeting Bruno unlawfully

[69] *NLRB v. Norbar, Inc*., 752 F.2d 235 (6th Cir. 1985).

[70] *NLRB v. E. I. DuPont Co*., 750 F.2d 524 (6th Cir. 1984); *Henry I. Siegel Co. v. NLRB*, 4l7 F.2d 1206 (6th Cir. 1969).

[71] *Pennsy Supply*, 295 NLRB 324 (1989); *Electric Hose & Rubber Co*., 267 NLRB 488 (1983); *C-F Air Freight*, 247 NLRB 403 (1980).

[6] *McCormick Longmeadow Stove Co*., supra at l242; *Champion Pneumatic Machinery Co*., 152 NLRB 300, 306 (1965).

[7] Cf. *The Gates Rubber Company*, 182 NLRB 95 (1970).

[8] See, e.g. *FMC Corporation, Power Control Division*, 216 NLRB 476 (1975).

[9] See, e.g. *Frito-Lay, Inc*., 185 NLRB 400 (1970).

[72] *Litton Industrial Products*, 221 NLRB 700, 701 (1975), enf. denied 543 F.2d 1085 (4th Cir. 1976). Also see *Elston Electronics Corp*., 292 NLRB 510 (1989).

[73] *Mariposa Press*, 273 NLRB 528 (1984); *Chester Valley*, 251 NLRB 1435 (1980).

[74] *Doces Sixth Avenue*, 225 NLRB 806 (1976). Also see *Mariposa Press*, supra.

solicited their grievances and promised these employees that the Respondent would remedy them. In fact, the Respondent did just that by granting Guiles and Law wage increases and dividing up Prashaw's truck route between them that very day. Moreover, although the Respondent has a policy of granting wage raises in April-June, after employees are given performance reviews in April of that year, and to new employee 6 months after their hire, both Guiles, who had worked for the Respondent for 10–11 months, and Law who had been employed for 6–7 months had not been timely reviewed and the Respondent offered no valid reason for this omission. It is conceivable that without the advent of the Union's organizational campaign and its filing of a representation petition with the Board, neither Guiles nor Law would have been reviewed until April 1991 with all the other employees for raises.

Additionally, while Bruno denied that on January 24, 1991, he was aware that Guiles supported the Union, and I assume that this would include Law as well, this is clearly contradicted by evidence that the Union, by letter hand delivered to Bruno on January 22, 1991, advised the Respondent that Guiles, Law and Prashaw had signed authorization cards and had been designated as Union ''committee people.''[75] Thus, the timing of the wage increase—just days after Bruno was informed that these employees favored the Union—weighs heavily against the Respondent's asserted reason for the wage increases. As for the Respondent's reliance for support on the fact that Carlin was not granted a raise on January 24, 1991, although he requested one, this could also be considered along the lines that Bruno was aware that Carlin was already against the Union therefore there was no reason to seek to influence his vote in any upcoming election, especially in view of the fact that in April he would be considered for a raise anyway. Also, Carlin had been employed by the Respondent for about 3 years, and Bruno met with him individually, so that for at least the immediate future, Carlin would be unaware of any raises granted that day, if this was a consideration of Bruno's at all under the circumstances.

From all of the above, I find and conclude that the Respondent has failed to make an affirmative showing, with respect to the timing of its wage raises to Guiles and Law, that such raises were motivated by factors other than the Union's organizational campaign or the pendency of the election, and thereby by granting such wage increases violated Section 8(a)(1) of the Act.

5. Surveillance

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act when it created the impression that it was keeping under surveillance the union activities of its employees. The Respondent denies this allegation.

In determining whether a respondent has created an impression of surveillance, the Board applies the following test: whether employees would reasonably assume from the statement in question that their union activities have been placed under surveillance.[76]

The evidence herein indicated[77] that William Henry, whom I found to be an agent of the Respondent, prepared and circulated a petition against the Union for employees signatures. On company time and on company property, Henry was observed by at least two of the Respondent's employees, Verde Snyder and Richard Walrath, marking off the names of employees who had signed the petition or refused to do so from a list of employees, and it is reasonable to infer from the circumstances present in this case that other employees also saw this and were aware of what Henry was doing as well. Moreover, almost immediately after Bush signed the petition against the Union an owner, Michael Bisnett, came over and thanked him for signing it and put his arm around Bush's shoulders for employees to see. Bush, on another occasion observed Bisnett and Henry pointing to another employee who had just signed the petition, again possibly in view of other employees. Bisnett admitted knowing about Henry's circulation of the antiunion petition and observing the petition and the names of employees who had signed it, notwithstanding that Henry had advised Bush that no one from management would be apprised of what was happening or be told the names of employees who signed or did not sign the petition. Henry's response to Bush when Bush confronted him with Bisnett's knowledge that he had signed the petition is enlightening, Henry told him that it made no difference whether management knew or not since Bush had already signed the petition and he therefore had nothing to worry about. Also, Rood's testimony that he signed the petition because it would give the Respondent the impression that he was against the Union currying management's favor ''in light of prior terminations,'' raises the inference that he believed that the Respondent would learn that he had signed it.

As regards Bisnett's statement to Bush at the end of March 1991, made several times during the day that, ''Yoo hoo, Harold, I'm watching you,'' Bush expressed bewilderment at what Bisnett meant by this. Bush had not signed a union authorization card and had attended only one union meeting. It is unclear from the record as to whether Bush's actions, his refusal to sign the petition when first asked by Henry to do so, his attendance at a union meeting after telling Henry that he wanted to hear the Union's side, and then his actual signing of the petition against the Union each came before or after Bisnett made these seemingly bizarre statements to Bush. If Bisnett's statements came before Bush signed the petition there would be a strong inference that the Respondent through Bisnett was placing Bush's union activities under surveillance, it could appear to imply nothing else that makes sense. If the statements came after, the inference would be weakened but still could be assumed to be a reminder to Bush about what to do in the upcoming election.

Be that as it may, and from all of the above, I find and conclude that the Respondent created the impression that its

[75] It is also reasonable to assume from the evidence that Whitton had told Bruno on January 18 or 19, 1991, that Guiles, Law, and Prashaw had spoken to a union representative and signed union authorization cards.

[76] *United Charter Service*, 306 NLRB 150 (1992); *South Shore Hospital*, 229 NLRB 363 (1977); *Schrementi Bros.*, 179 NLRB 853 (1969).

[77] It should be noted that for the reasons previously stated herein, I credit the testimony of Bush, Snyder and Walrath over that of Michael Bisnett and Henry.

employees' union activities were under surveillance thereby violating Section 8(a)(l) of the Act.[78]

6. Threat of plant closure

The complaint alleges that the Respondent, through Chester G. Bisnett Sr., threatened to close its facilities because of the union activities of its employees in violation of Section 8(a)(1) of the Act. The Respondent denies this allegation.

Vern Arno testified that on April 8, 1991, following the Board election on April 5, 1991, while he was in dispatcher Terry Morehouse's office, the Respondent's president, Chester G. Bisnett Sr., asked Arno what he thought about the election which the Union had lost. Arno responded that if the Respondent failed to make the changes in wage and other working conditions as it had said it would, and there was another Board election Arno would vote for the Union. Bisnett Sr. then told Arno that, ''Well, if I was running this place, I would lock the doors and send everyone home. . . . [I] would never have the Union.'' I credit Arno's account of this occurrence since Bisnett Sr. was not called as a witness to testify herein and Arno's testimony remained uncontradicted in the record.

Bisnett Sr. is the Respondent's president, and the record is devoid of any evidence that the employees considered him as a ''figure head.'' Moreover, Bisnett Sr. statement was clearly a threat that the Respondent's operations would close if the Union ever came in and thereby interfered with, restrained, or coerced employees in the exercise of their statutory rights under the Act in violation of Section 8(a)(1) of the Act.[79]

7. Imposition of more onerous working conditions

The complaint alleges that the Respondent violated Section 8(a)(1) and (3) of the Act when it imposed more onerous working conditions on employee Verde Snyder, and violated Section 8(a)(1) of the Act when its supervisor, Robert Dalton, told Snyder that the Respondent was taking such action because of Snyder's activities on behalf of the Union. The Respondent denies these allegations.

The record evidence shows that it was the Respondent's practice in the mechanics yard to divide the outside yard work between all the mechanics so that the hardship of working outdoors during the cold winter months would be bourne equally among them. After the Union began its organizational campaign in January 1991, Snyder discussed the Union with his supervisor, Robert Dalton, on numerous occasions with Snyder telling Dalton that the Union would be good for the employes and that most of the mechanics supported the Union. Snyder signed a union authorization card on January 28, 1991, discussed the Union with other employees, and attended two union meetings.

Snyder testified that in late January or early February 1991, Dalton started to assign him to perform most of the outside yard work on cranes and loaders, and Dalton's friendly attitude towards Snyder and the other mechanics ceased. Sometime in mid-February 1991, Snyder approached Dalton and complained about his being assigned more of the outside yard work than the other mechanics contrary to past practices, and why Dalton's friendly attitude towards the employee had changed. Snyder also informed Dalton at this time that he had signed a union authorization card. According to Snyder, Dalton's response was that, ''[T]he union thing has got a lot to do with what was going on at the time.'' Dalton also told Snyder that the Respondent had instructed him to stop being friendly with the other employees.

Dalton denied assigning Snyder anymore outside yard work than the other mechanics or that Snyder had complained to him about his. However, Dalton acknowledged that Snyder, who performed mainly repair work, had been assigned to repair an outside circuit panel and for a period of time to work on a trailer in the yard, although Dalton maintained that other employees, such as a welder, were also working on this trailer at the same time. Dalton admitted that he was aware that Snyder favored the Union, at first stating that Snyder had told him so, then that although Snyder had not told him directly that it was common knowledge among the employees.

I credit the testimony of Verde Snyder over that of Robert Dalton. Snyder's testimony was consistent with the testimony of other of the General Counsel's witnesses I credited above, appeared forthright and was consistent with other evidence in the record. Moreover, while it is true that Snyder is a discriminatee in this case, it appears that he was subsequently rehired and working for the Respondent at the time he testified herein and with what had transpired regarding his previous layoff, at issue in this proceeding, it took some courage to testify about a different issue adverse to the Respondent, his employer. Although I do not dismiss Dalton's testimony out of hand, it appeared designed more to assist the Respondent's positions herein than consistent with the other evidence in the record on this and other issues as well.

Dalton's assignment of Snyder to perform more than his share of the outside yard work contrary to past practice raises the inference that such action was taken for other than legitimate business justification especially in view of Dalton's statement that the Union had a lot to do with what was happening at the time. I therefore find and conclude that when the Respondent imposed more onerous working conditions on Verde Snyder because of his union activities, the Respondent violated Section 8(a)(1) and (3) of the Act.[80] The Respondent also violated Section 8(a)(1) of the Act when Supervisor Robert Dalton told Snyder that it was taking this action against him because of his activities on behalf of the Union.[81]

8. Alleged unlawful termination of employees

The complaint alleges that the Respondent violated Section 8(a)(1) and (3) of the Act by terminating employees Eugene Prashaw, Verde Snyder, Richard Walrath, Mark Rood, and Vern Arno, on various respective dates, because of their union activities. The Respondent denies these allegations.

Section 8(a)(3) makes it an unfair labor practice for an employer to discriminate ''in regard to hire or tenure of employment or any term or condition of employment to encour-

[78] *United Charter Service*, supra; *Belcher Towing Co. v. NLRB*, 726 F.2d 705 (11th Cir. 1984), enfg. 265 NLRB 1258 (1982); *Crown Cork & Seal Co.*, 254 NLRB 1340 (1981).

[79] *Cartridge Actuated Devices*, 282 NLRB 426 (1986). Also see *Sweetwater Crafts*, 300 NLRB 18 (1990).

[80] *Lakepark Industries*, 293 NLRB 452 (1989); *Laminates Unlimited*, 292 NLRB 595 (1989).

[81] Ibid.

age or discourage membership in any labor organization.'' Under the test announced in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), and approved by the Supreme Court in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983), a discharge is violative of the Act only if the employee's protected conduct is a substantial or motivating factor for the employer's action. If the General Counsel carries his burden of proving unlawful motivation, then the employer may avoid being held in violation of Section 8(a)(1) and (3) of the Act only if it can show that ''the same action would have taken place even in the absence of the protected conduct.''[82] The first part of the *Wright Line* test requires proof not only that the employer knew of the employee's union activities, but also that the timing of the alleged reprisal was proximate to the protected activities and that there was antiunion animus ''to link the factors of timing and knowledge to the improper motivation.''[83] It is also well settled, however, that when an employer's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motivation is an unlawful one that the employer desires to conceal.[84] The motive may be inferred from the total circumstances proved. Moreover, the Board may properly look to circumstantial evidence in determining whether the employer's actions were illegally motivated.[85] That finding may be based on the Board's review of the record as a whole.[86]

a. *Layoffs*

1. Eugene Prashaw

Prashaw was employed by the Respondent for approximately 3-1/2 years as a truckdriver. Prashaw signed a union authorization card on January l6, 1991 and by letter hand delivered to Bruno, part-owner and a vice president of the Respondent, on January 22, 1991, the Union informed the Respondent that Prashaw, among other employees, had signed such a card and was officially designated as a union committeeman. On January 28, 1991, Prashaw was laid off. In its layoff letter to Prashaw, the Respondent asserted that the reason for this action was the restructuring of its truck routes and since Prashaw's route was being ''absorbed by the remaining drivers'' there was no need for his driver's position and it was being eliminated.

However, at the hearing, Bruno gave as the reasons for the Respondent's action in laying off Prashaw: that the Respondent had received numerous complaints about Prashaw's work performance from his supervisor Whitton; that at the meeting on January 24, 1991, with Prashaw's fellow employees Guiles and Law, these employees complained about having to perform part of Prashaw's work and since they had also requested additional work hours to supplement their salaries and had raised the feasibility of dividing Prashaw's truck route between them, Bruno agreed to this proposal to satisfy their requests and resolve their complaints; and that by laying off Prashaw, the Respondent would benefit monetarily since eliminating Prashaw's position the Respondent would save the cost of his salary and use of his truck.

The record evidence herein shows that the reasons advanced by the Respondent for its layoff of Eugene Prashaw were pretextual.

Prior to January 28, 1991, Prashaw had received no indication or notice that the Respondent was considering consolidating his truck route or that he would be laid off. In fact, as Bruno admitted, the decision to take such action was made on January 24, 1991, significantly 2 days after the Respondent learned of Prashaw's union activities.[87] It is also significant that Prashaw never received any written warning notices regarding his alleged work deficiencies and Bruno maintained that Prashaw's layoff was not considered a disciplinary action.[88] Moreover, it should be remembered that the sole reason advanced by the Respondent in its layoff letter to Prashaw was the restructuring of its truck routes leading to the elimination of Prashaw's position. Also, Prashaw was the most senior of the four truck drivers at the Respondent's Gouverneur facility.[89]

Additionally, after Prashaw's layoff supervisors were required to fill in driving Prashaw's route besides Guiles and Law, which would indicate that the need for another driver on Prashaw's truck route was not eliminated by any ''restructuring.'' This finds support in the fact that just 2 months after Prashaw's layoff, the Respondent advertised in the local newspaper for a truck driver and since that time hired four other drivers, two of whom were still employed by the Respondent at the time of the hearing.[90] Furthermore, when Prashaw subsequently learned of a job opening with the Respondent for ''roll-off'' driver, he requested consideration for

[82] *Wright Line*, 251 NLRB at 1089. Also see *J. Huizinga Cartage Co. v. NLRB*, 941 F.2d 616 (7th Cir. 1991).

[83] *Hall Construction v. NLRB*, 941 F.2d 684 (8th Cir. 1991).

[84] *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1960).

[85] *Asociacion Hospital del Maestro*, 291 NLRB 198 (1988); *White-Evans Service Co*., 285 NLRB 81 (1987); *NLRB v. O'Hare-Midway Limousine Service*, 924 F.2d 692 (7th Cir. 1991).

[86] *ACTIV Industries*, 277 NLRB 356 (1985); *Heath International*, 196 NLRB 318 (1972).

[87] I am not unaware that Guiles and Law had also been identified in the Union's letter to Bruno as having signed union authorization cards and been designated as union committeemen. However, their appearance at the January 24, 1991 meeting with Bruno presented the Respondent with the opportunity to hear these employees grievances, judge what the promise to resolve these grievances might portend, and in remedying them dissuade these employees from supporting the Union. On the other hand with Prashaw's failure to attend this meeting, his layoff might serve as a lesson to those who continued to support the Union. Moreover, the Board has held that the termination of only one of several union activists does not, without more, support an inference that the employer's motivation for such termination was lawful. See *Nachman v. NLRB*, 337 F.2d 421 (7th Cir. 1964).

[88] The Respondent introduced into evidence two ''disciplinary action forms'' dated 6/28/90 and 8/7/90, allegedly from Prashaw's personnel file. However, these documents were not signed by Prashaw, the testimony of various witnesses establishes that Prashaw never was shown or received copies thereof and since Prashaw was never informed about them, it cannot be said that the Respondent complied with its purported disciplinary procedure leading to termination then in effect, although the Respondent asserted that these disciplinary forms were a consideration in its decision to layoff Prashaw. Moreover, neither Prashaw nor any of the other discriminatees discussed hereinafter, were given any advance warning nor any opportunity to correct any problems the Respondent had with them prior to their termination as provided for in the disciplinary procedure.

[89] See for example *International Metal Co*., 286 NLRB 1106 (1987).

[90] See *Christopher Construction Co*., 288 NLRB 1272 (1988).

the job through the Respondent's dispatcher-supervisor, Terry Morehouse, and by letter to Bruno. No response to his requests were received by Prashaw although he was apparently qualified for the position.[91]

As found herein, the Respondent engaged in numerous violations of Section 8(a)(1) of the Act during the critical preelection period. This together with its knowledge of Prashaw's protected activities and the timing of his layoff in close proximity to Prashaw's union activities evidences that the General Counsel has established a prima facie case that a reason for the Respondent's layoff of Eugene Prashaw was his protected activities and was discriminatorily motivated.[92]

In order to rebut the prima facie case, the Respondent must demonstrate that it would have laid off Prashaw in the absence of his protected activities. The Respondent has the burden of presenting ''an affirmative defense in which the employer must demonstrate by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct.''[93] Having found that the Respondent's proffered justifications for the layoff of Prashaw were pretextual, I conclude that the Respondent has failed to meet its *Wright Line* burden of demonstrating that it would have taken the same action in the absence of Prashaw's union activities.[94]

Based on the foregoing, I find and conclude that the Respondent violated Section 8(a)(3) and (1) when it laid off Eugene Prashaw because of his union activities.[95]

The complaint also alleges that the Respondent terminated Eugene Prashaw and consolidated routes in order to redress grievances of its employees and in order to dissuade employees from engaging in activities on behalf of the Union in violation of Section 8(a)(1) of the Act. The Respondent denies this allegation.

Bruno admitted that one of the reasons he laid off Prashaw and divided his truck route between Guiles and Law was to satisfy their request to him for additional hours to supplement their salaries and their suggestion of such action against Prashaw. Having previously found that the Respondent violated Section 8(a)(1) of the Act when Bruno solicited grievances from employees Guiles and Law and explicitly and implicitly promised to rectify these grievances, the actual act of remedying such grievances is in and of itself a violation of Section 8(a)(1) of the Act since it interferes with, restrains, and coerces employees in the exercise of the rights guaranteed them in Section 7 of the Act.[96]

2. Verde Snyder

Snyder commenced his employment with the Respondent in September 1988 as a truckdriver. In September or October 1989 Snyder was transferred to a mechanics position which he held until his layoff on February 22, 1991. Snyder signed a union authorization card on January 28, 1991, and spoke openly in favor of the Union frequently with his fellow employees and with his supervisor, Robert Dalton. As found hereinbefore, soon after Snyder signed the union card he was assigned to more onerous working conditions and Dalton's previously friendly attitude towards him changed. About a week before his layoff, Snyder asked Dalton why things had changed between them and why he was being assigned more than his share of wintertime outside work and Dalton replied that the Union had a lot to do with it. Snyder then told Dalton that he had signed a union authorization card and that he didn't care who knew about it. However, admittedly it was also common knowledge at the Respondent's facility that Snyder was in favor of the Union.

A week after this discussion with Dalton, Snyder appeared for work on February 25, 1991, and was handed a letter by Bruno who told him ''this is how the Company feels.'' The letter notified Snyder that his last day of work was February 22, 1991, and that the reason for this was that his position had been eliminated after ''careful reassessment of the workload in our maintenance shop.''

At the hearing the Respondent asserted that because of poor economic conditions resulting in a decline in the mechanics division workload it had been decided to eliminate one mechanics position. Since Verde Snyder was the least qualified and experienced of the mechanics, and was the subject of consistent coworker complaints, i.e., failure to perform his work adequately, poor attitude, smokes, and drinks coffee all during the shift, resentful of supervision, and had been involved in the harassment of a fellow employee who refused to support the Union, the Respondent had chosen his position for elimination and Snyder for layoff.

The record evidence establishes that the reasons alleged by the Respondent for the elimination of Verde Snyder's position are pretextual.

Prior to February 25, 1991, Snyder had received no indication or notice that the Respondent was contemplating the elimination of any of the mechanics positions. In fact, before Snyder's layoff, no mechanic had ever been laid off by the Respondent for any reason. Moreover, at the time of Snyder's layoff he and the other two working mechanics, Todd Hayes and Frank Snyder (no relation) were all working overtime averaging 55–60 hours weekly. While it is true that another mechanic, William Ramsey, was out sick at the time, he apparently did not return to work until a week or more after Snyder was laid off, Ramsey generally was assigned to perform tire maintenance and service. Also, the Respondent hired a new mechanic approximately three months after Snyder was laid off, the remaining mechanics continued to work substantial hours thereafter, and Snyder observed that there had been no decline in the shop work prior to his layoff.

Additionally, it is significant that Snyder never received verbal or written warnings about his alleged poor work performance or bad attitude, etc.[97] Moreover, Snyder received

[91] See for example *Jumbo Produce*, 294 NLRB 998 (1989); *Northeast Lincoln-Mercury*, 292 NLRB 857 (1989).

[92] *Roure Bertrand Dupont, Inc*., 271 NLRB 443 (1984).

[93] *Equitable Gas Co*., 303 NLRB 925 (1991); *Chelsea Homes*, 298 NLRB 8l3 (1990).

[94] *Fluor Daniel, Inc*., 311 NLRB 498 (1993); *Shattuck Denn Mining Corp. v. NLRB*, supra.

[95] Ibid. Also see *Collectramatic, Inc*., 267 NLRB 866 (1983).

[96] *House of Raeford Farms*, 308 NLRB 568 (1992).

[97] The Respondent introduced into evidence three documents which alleged instances of poor work performance and employee harassment by Snyder. One was undated and unsigned by anyone, another was dated 3–7–91 and signed only by Dalton, and the third describing incidents of harassment by Snyder of a fellow employee is signed by Dalton and the employee, Frank Snyder. Testimony established that these documents were prepared after Verde Snyder was laid off so that he never saw them, the preparer of the documents was unknown and I therefore do not give much weight to

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wage increases during his employment with the Respondent, the above strongly suggesting that while the Respondent was willing to put up with his alleged poor performance and work attitude prior to the advent of the Union's organizational campaign, once the Union appeared on the scene and Verde Snyder supported it, his deficiencies now became unacceptable to the Respondent.

Furthermore, Snyder had more seniority than two of the other mechanics; Todd Hayes had been employed by the Respondent at the time for 3–4 months and Frank Snyder from 6–13 months. When considering that Ramsey performed generally ''tire work,'' Snyder would then have been the mechanic with the most experience in performing the mechanical service work required by the Respondent's operation. Add to this that Snyder had never been given any verbal or written warnings about his work performances, had received wage increases over the course of his employment with the Respondent, and had substantially more seniority than the other two mechanics, and under these circumstances it is highly suspect that Snyder would be laid off first if the elimination of one mechanics position for business reasons were the real reason for this action.[98]

Of additional significance is the Respondent's failure to mention any of its asserted reasons for selecting Snyder for layoff in its letter notifying him of his last day of work. This letter raised the declining mechanics workload as the only reason for its action. Moreover, even the Respondent's assertion that Snyder was chosen for layoff because he was the ''least experienced'' of the mechanics remains doubtful. Snyder had had approximately 2-1/2 years of on-the-job training as a mechanic, had been granted raises during this period presumably for adequate or better work, and had never received warnings about his work performance. Even if Snyder was the least experienced of the mechanics as compared to Todd Hayes who had previous vocational training and Frank Snyder's diesel school experience, he undisputedly had more experience than John Hayes who was hired subsequently in June, 1991, and apparently more than Ramsey who was used for tire maintenance and service.

From the record evidence it is clear that the Respondent was aware of Verde Snyder's union activities. The Respondent also has been found to have engaged in various violations of Section 8(a)(1) of the Act during the critical preelection period. These, together with the timing of his layoff occurring close to Snyder's union activities establishes that the General Counsel has sustained his burden of proving a prima facie case that a reason for the Respondent's layoff of Verde Snyder was his protected activities.[99]

Having found that the Respondent's asserted reasons for laying off Snyder were pretextual, I conclude that the Respondent has failed to meet its *Wright Line* burden of showing that it would have taken the same action against him in the absence of his protected activities.[100] From all the above, I find and conclude that the Respondent violated Section 8(a)(3) and (1) of the Act when it unlawfully laid off Verde Snyder because of his union activities.[101]

b. *Discharges for alleged misconduct*

It is well settled that an employer's ''business justification'' for terminating an employee will be held to be pretextual where other employees who have engaged in similar or more serious conduct receive milder or no discipline at all.[102] Such disparate treatment of an employee tends to support the inference of an unlawful motive, rather than good-faith business judgment.[103]

Under the analysis set forth in *Wright Line*, supra, the General Counsel must show that the protected conduct of an employee was a motivating factor in the employer's decision to discharge him. Once established, the burden then shifts to the employer to demonstrate that it would have discharged this employee even in the absence of the employee's union activities.[104]

1. Richard Walrath

Walrath commenced his employment with the Respondent in late June or early July 1990 as a ''roll-off'' truckdriver at the Respondent's Potsdam facility. Walrath signed a Union authorization card on January 23, 1991, attended one union meeting prior to his discharge, and spoke favorably about the Union to his fellow employees. About 1 week before his termination Walrath was asked by an employee, obviously William Henry, to sign the petition against the Union which Walrath refused to do. Walrath then saw Henry place a mark against his name after his refusal to sign the petition.

On February 19, 1991, Walrath dented the top of a container at the Newton Falls Paper Company while moving the box. Upon his return to the Potsdam facility he reported this incident to Terry Morehouse, his supervisor who unaware of the extent of the damage told him to forget about it since dents to containers were a common occurrence. On February 21, 1991, Morehouse advised Walrath that part-owner and Vice President Chester Bisnett Jr. had viewed the container and wanted to speak to him about the damage and that Walrath should explain to Bisnett Jr., that Walrath had tried to tell Morehouse about the damage but Morehouse was busy, sent Walrath out on another assignment, and it was later forgotten. Walrath was unable to speak to Bisnett Jr. that day because Bisnett was too busy.

On March 1, 1991, Walrath was called to Bisnett Jr's. office and given a letter of termination. Bisnett Jr. refused to listen to Walrath's explanation as to what happened and referred to two other accidents that Walrath had been involved in previously and this last one. Walrath's discharge letter gives as the reason for his termination Walrath's ''unsafe working habits'' in that he was involved in two prior accidents (each involved the dropping of a container off a truck resulting in damage to the truck's lights and fender), and the latest one in which Walrath ''badly damaged'' a container

them. Furthermore, this fails to reflect the Respondent's compliance with its own disciplinary procedure then in effect regarding warning notices and termination.

[98] *International Metal Co*., supra; *Sogard Tool Co*., 285 NLRB 1044 (1987).

[99] *Roure Bertrand Dupont, Inc*., supra.

[100] *Fluor Daniel, Inc*., supra; *Equitable Gas Co*., supra; *Shattuck Denn Mining Corp. v. NLRB*, supra.

[101] Ibid.

[102] *Bay Corrugated Container*., 3l0 NLRB 450 (1993); *Chopp & Co*., 295 NLRB 1058 (1989); *Springhill Services*, 295 NLRB 1021 (1989); *Future Ambulette*, 293 NLRB 884 (1989).

[103] *NLRB v. Future Ambulette*, 903 F.2d 140 (2d Cir. 1990); *NLRB v. J. Coty Messenger Service*, 763 F.2d 92 (2d Cir. 1985).

[104] *Wright Line*, supra.

while hitting a door opening entering or existing a building. Bisnett Jr.'s letter also states that since Walrath had failed to inform him of this accident, ''how this happened or why'' the Respondent assumed that Walrath was covering the accident up to escape any consequences and hoped it would remain unnoticed and/or undiscovered.

Whatever part credibility plays in resolving this issue, it should be noted that I would credit the testimony of Richard Walrath over that of the Respondent's witnesses Colleen Wallace, Chester Bisnett Jr., James Bruno, and Terry Morehouse. Wallace's testimony at times was contradictory and unsubstantiated regarding the accident reports on which the Respondent allegedly based Walrath's termination and the Respondent's actual disciplinary procedure, and the same can be said of Bisnett Jr.'s. I also noted some disparity between each other's testimony regarding driver accidents. Moreover, Walrath's testimony as concerns other issues in this case was consistent with other credited witnesses herein and with other uncontested evidence in the record and, overall, he testified in a forthright manner.

Be that as it may, and while Bisnett Jr. maintained that he discharged Walrath because of these accidents and the seriousness of the last one, because Walrath could have caused extensive damage to the property of one of the Respondent's major customers, the record evidence is replete with driver accidents of an equal or more serious nature in which the Respondent issued no discipline or, when it did, discipline of a substantially milder nature, and no driver was ever fired for this before. Among the other driver accidents listed hereinbefore, I note particularly that of driver Caylon Foster, causing damage to a customer's wall to the extent of $12,000–$13,000 paid by the Respondent with no discipline imposed, and driver Wade Rivers who backed his truck loaded with a steel beam into a building damaging the wall for which he received a 3-day suspension.

Additionally, the Respondent's contentions that Walrath was fired because he had been involved in three accidents is disingenuous. First, discharge for a third accident does not explain the disparate treatment accorded Walrath as compared with driver Robert Converse who was involved in four incidents. Also, Walrath's termination does not comply with the Respondent's stated policy set forth in its Employees Handbook of progressive discipline nor its past practice of warning employees and affording them reasonable consideration before the final step of termination. Moreover, as pointed out in the briefs of both the General Counsel and the Union, the testimony of the Respondent's witnesses regarding Walrath's two previous accidents illustrates the pretextual nature of this alleged reason for his discharge. After testifying that the Respondent relied on these written records of Walrath's two prior accidents and that these records were available, later in the proceeding it was finally conceded by the Respondent that no records existed of these previous incidents, notwithstanding Morehouse's testimony that he had written Walrath up for these incidents.

The record evidence clearly shows that the Respondent was aware of Walrath's prounion sympathies and activities. Walrath signed a union authorization card, attended a union meeting before his discharge, and spoke openly with other employees in favor of the Union. After Walrath refused to sign the petition against the Union for William Henry, whom I previously found to be an agent of the Respondent, Henry had noted this on his employee's list.[105] Moreover, the Respondent's knowledge of Walrath's union activities may also be inferred under the Board's small-plant doctrine that ''rests on the view that an employer at a small facility is likely to notice union activities at the plant because of the close working environment between management and labor.''[106]

The Respondent engaged in numerous violations of Section 8(a)(1) of the Act and, as previously also found, of Section 8(a)(3) and (1) of the Act. This, together with its knowledge of Walrath's protected activities and the timing of his discharge establishes a prima facie case against the Respondent.

The great disparity in the Respondent's treatment of Walrath and that of other employees who were either antiunion or had engaged in no union activities as far as the Respondent knew, strongly suggests that it was not Walrath's accidents that motivated his discharge. Rather it appears that the Respondent seized on this reason as a pretext to fire him. Based on the foregoing, I find that the Respondent has failed to demonstrate by a preponderance of the evidence that Walrath would have been discharged even without his protected activity.[107] Accordingly, I find and conclude that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Richard Walrath because of his union activity.

2. Mark Rood

Mark Rood began his employment with the Respondent in September 1989. Rood signed a union authorization card on January 23, 1991, and attended one union meeting prior to his termination on March 1, 1991. The record evidence clearly establishes that the Respondent was aware of Rood's prounion feelings. During the critical preelection period, specifically during the week of February 17, 1991, Michael Bisnett asked Rood's father, who did business with the Respondent, ''why is Mark so hell bent on getting a union in here?'' Also, on February 25, 1991, while Rood, engineer Ned Potts, and Michael Bisnett were discussing overweight truckloads, Bisnett advised Rood to seek answers about this from his ''rep,'' which Rood believed could only be a reference to the Union's representative, especially in view of Bisnett's comments to his father, which had been disclosed to him previously.[108] Moreover, Bisnett admitted knowing that Rood supported the Union.

The next day, February 27, 1991, after loading his truck, Rood forgot to lower the loading boom and while backing

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[105] See *Kidde, Inc.*, 284 NLRB 78 (1987).

[106] *Sogard Tool Co.*, supra; *NLRB v. Health Care Logistics*, 784 F.2d 232 (6th Cir. 1986), quoting *Alumbaugh Coal Corp. v. NLRB*, 635 F.2d 1380 (8th Cir. 1980).

[107] *Bay Corrugated Container*, supra; *Pottsville Bleaching Co.*, 303 NLRB 186 (1991); *Mid-Mountain Foods*, 291 NLRB 693 (1988).

[108] I credit the testimony of Rood over that of Bisnett and Potts. Besides Having discredited Bisnett's testimony on other issues, Rood's testimony was given in a forthright manner and importantly, consistent with other credited evidence in the record. Moreover, Potts' testimony was contrary to other testimony in the record constituting admissions and seemed designed to advance the Respondent's cause herein rather than the truth. For example, Rood testified as to a statement made to him by Bisnett in Potts presence on February 26, 1991, regarding the wearing of ''clean pants'' when driving his truck. Potts denied hearing Bisnett make this statement while Bisnett admitted doing so.

towards the warehouse building he damaged a wall and door canopy. When Rood reported this to Bisnett and apologized for the damage, Bisnett told him that he would make a decision later as to what to do about this accident. Upon Rood's return from delivering his truckload later that afternoon, Potts told him that if he were Rood he would act very nonunion especially in light of the accident that morning, since the Respondent was looking for an excuse to get rid of him and Rood may have given the Respondent its reason that morning. Potts admitted telling Rood that his being associated with the Union ''might not be in his own best interests.''

On March 1, 1991, while at work Rood was given a letter of termination by Chester Bisnett Jr. and James Bruno which stated that Rood had received training in the operation of the truck boom and was being discharged because of the accident on February 27, 1991. The Respondent maintains that Rood was fired because of the potential seriousness of this accident. According to the Respondent and, although extensive damage was caused to the building, more serious was the potential for harmful injury to both Rood and others since Rood could have struck high tension wires with the upraised boom. However, the Respondent concedes that Rood was a good employee and while Rood had been involved in two prior accidents in 1990, these were inconsequential and played no part in his discharge. Besides Rood was not disciplined for these prior incidents.

The record evidence herein shows that the Respondent's asserted reason for terminating Mark Rood is pretextual. Examples of other employees who were involved in similar or more serious conduct and received lighter discipline or none at all abounds in the record. For example: driver, Calvin Rose actually struck overhead electrical wires in the Respondent's yard while driving his truck with the boom extended, shorting out electricity to the building, and for which he received no discipline; driver William Converse struck a building with a raised hoist at a customer's site damaging an overhang, but received no discipline; driver Ralph Shatraw struck overhead signal lights with an oversized container unit knocking them down without receiving any discipline for the incident; driver Robert Converse backed his truck away from a loading dock too quickly almost injuring a forklift driver whereupon converse received a 3-day suspension after the other employee complained about Converse's carelessness; also, Converse was almost struck by a train when he recklessly failed to stop his truck at a railroad crossing before proceeding with no discipline imposed for this potentially dangerous incident; driver, Gene Pharo allowed a loaded scrap bin to fall off his truck onto a street resulting in his being ticketed by police and received no discipline. It is reasonable to infer varying degrees of potential hazard to the driver and/or others in these incidents.

Moreover, the Respondent's defenses for its disparate treatment of Rood appear contrived and without merit. The Respondent asserted that these accidents, excluding Rood's and Walrath's, were not the fault of the particular driver because of vehicle defects, unclear or improper instructions by other employees or supervisors, or changed policies. I did not find Bisnett Jr's. explanation of his investigations of these incidents convincing and the Respondent produced no other evidence to support his testimony such as, repair records, incident reports regarding driver complicity or fault, or testimony by the drivers themselves. Also, the incidents cited herein are not sufficiently distinguishable to warrant disparate treatment. Significantly, some of these incidents, of a similar or more serious nature, occurred after these employees were discharged and the driver involved was not terminated.[109]

At the hearing the Respondent also seemed to allege that Rood and Walrath were treated differently because of a new more strict policy regarding accidents occasioned by the insistence of its insurance carrier including adequate reporting thereof. I find no support for this defense in the record evidence. First, even if this new program existed at the time alleged by the Respondent, the Respondent admitted that the new policy and the accident forms in connection therewith, were not disseminated to the employees or notice thereof given to them. Second, if the new policy was implemented in December, 1990,[110] the question arises as to why the accidents of Ceylon Foster, Robert Converse, Gene Pharo, etc., were also not dealt with under the new stricter disciplinary policy terms as was Walrath and Rood. These facts illustrate that the Respondent's new policy on discipline was discriminatorily applied to union adherents.

The obvious disparate treatment accorded Mark Rood clearly establishes that Rood was discharged not for the reasons set forth in his termination letter of March 1, 1991, but for his support of the Union. It also appears more than coincidental that some of the employees who were involved in comparable or more serious accidents, and who received lesser or no discipline at all were against union representation such as Pharo and Foster.

The Respondent's numerous violations of Section 8(a)(1) of the Act and its additional violations of Section 8(a)(3) and (1) of the Act demonstrating animus against the Union, together with the Respondent's knowledge of Rood's union activity, sufficiently evidences that the General Counsel has sustained its burden of establishing a prima facie case against the Respondent.

The disparate treatment accorded Mark Rood supports the inference that the reasons advanced by the Respondent for his termination were pretextual and that the Respondent's real motive was unlawful.[111] Accordingly, I find and conclude that the Respondent has failed to sustain its burden of proving that Rood would have been fired even without his protected activity and therefore, when it discharged him because of his union activity the Respondent violated Section 8(a)(3) and (1) of the Act.

The complaint also alleges that the Respondent violated Section 8(a)(1) of the Act when alleged Supervisor Ned Potts told Rood that the Respondent was seeking a reason to terminate him because of his union activities and that Rood should forgo such union activities. The Respondent denies this allegation.

In deciding this issue it is required that a determination be made as to whether Ned Potts is a supervisor and/or agent of the Respondent within the meaning of the Act. The General Counsel alleges that Potts is such a supervisor and agent

[109] The accident involving Robert Converse and the forklift driver occurred in August or September 1991 and resulted in a 3-day suspension; Wade Rivers' accident occurred in August 1991 for which Rivers received a 3-day suspension; and Gene Pharo's incident happened in March 1991 for which he received no discipline.

[110] Bisnett Jr. testified that it was created in the summer of 1990.

[111] *Wright Line*, supra. Also see fns. 102–103 herein.

of the Respondent. While the Respondent admitted in its answer that this was so, at the hearing it amended its answer to deny this allegation.

The evidence herein establishes that Ned Potts is a supervisor within the meaning of Section 2(11) of the Act and an agent of the Respondent under Section 2(13) of the Act.

Potts is employed by the Respondent at CBI Steel as a fabrication engineer. Potts receives the architectural drawings, places bids, contacts customers, purchases materials for the job committing the Respondent's credit, estimates job costs and referred to himself as the ''project manager.'' Potts and Bisnett decide job priority and Potts at times assigns work to the employees. Potts also recommended for hire a draftsman and upon his hire directed the draftsman's work. Potts has his own office, is salaried and with bonuses earns more than any other employee except for the Respondent's owners. Only the owners and supervisors are salaried. Potts was also not eligible to vote in the Board's election. While Potts' does not hire, fire, discipline, or evaluate employees, etc., he can effectively recommend hiring and it can reasonably be inferred that his recommendation for firing would be given substantial consideration. Moreover, the above strongly suggests that Potts' exercise of his duties involves the use of independent judgment and establishes ''some kinship to management, some sympathetic relationship between the [Respondent] and [himself].''[112]

Accordingly, I find that the General Counsel has sustained his burden of proving that Ned Potts is a supervisor and agent of the Respondent within the meaning of Section 2(11) and 2(13) of the Act, respectively.

Having found that Potts is a supervisory employee and an agent of the Respondent; and having previously credited Rood's testimony over that of the Respondent's other witnesses including Potts; and while Potts admitted telling Rood that associating with the Union was not in his best interests, he did not deny the substance of Rood's version of what he had said, that the Respondent was looking for a reason to fire him because of his support of the Union; and considering the totality of the Respondent's unlawful conduct herein, I therefore find and conclude that Potts' statements reasonably tended to restrain, coerce, and interfere with employee's rights guaranteed them under the Act and the Respondent thereby violated Section 8(a)(1) of the Act.[113]

3. Vern Arno

Vern Arno commenced his employment with the Respondent on April 29, 1989, as a rolloff truckdriver at the Respondent's Potsdam facility. Arno did not sign a union authorization card and was openly hostile to the Union at the beginning of its organizational campaign, having spoken against union representation at the employee's meeting held on February 15, 1991, at Uncle Max's Restaurant. However, at a union meeting held on February 24, 1991, Arno mentioned the Respondent's low wages, long hours, and unfair working conditions and spoke in favor of the Union, and since he believed that the Respondent had an informer among the employees present at the meeting, he added that he didn't care if the Respondent were told of his current support of the Union.

Thereafter, Arno actively supported the Union, discrediting some of the Respondent's literature as ''scare tactics'' to employees and telling employees to support the Union. Additionally, at the beginning of April 1991, just prior to the Board election on April 5, 1991, Arno told Supervisor Terry Morehouse that changes were needed in working conditions and that he was going to vote for the Union in the upcoming election. Moreover, on April 8 or 9, 1991, soon after the election, Arno advised the Respondent's president, Chester Bisnett Sr., that if the Respondent failed to address needed changes in working conditions as promised prior to the election, then he would again vote for the Union in any ensuing election. As discussed hereinbefore, Bisnett Sr.'s response to this was that if it were up to him he would close down the Respondent's operations rather than accept the Union.

From the evidence herein, it is apparent that the Respondent was aware of Arnos' prounion feelings and his activities on behalf of the Union at the time he was discharged on April 15, 1991, notwithstanding Bruno's testimony to the contrary. In this connection, I credit the testimony of Vern Arno over that of James Bruno for the reasons previously used to discredit Bruno's testimony on other issues herein.

Arno's letter of termination states as the reason for his discharge, ''poor attitude in your dealing with valued customers,'' and listed the two incidents previously detailed hereinbefore as the examples of his poor attitude, one being the St. Lawrence University incident involving trash paper blowing about the campus, and the second involving Arno's late delivery of a load of bales and his depositing them on farmer Barry's property blocking his driveway. The letter also alleges that Arno had been rude and arrogant to the custodial services manager at the University during that incident, and unpleasant and discourteous to Mrs. Barry during the latter one.

On April 11, 1991, on Arno's return to the Respondent's facility after the occurrence at St. Lawrence University, Bruno confronted Arno with the complaint from the custodial manager at the University and with a complaint from a farmer customer about Arno's comments regarding the Respondent's delivery service if the Union came in. When Arno admitted making the comments, Bruno told him that he had ''no business talking to anyone about the Union. You know nothing about our business.'' Bruno also asked Arno if there was anything else bothering him and after Arno responded that he was sick and tired of long hours and low pay, Bruno said, ''Okay, that does it'' and told Arno to leave and return the following Monday to find out if he still had a job.

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act when Bruno told Arno on April 11, 1991, not to talk to anyone about the Union. However, in the context of this conversation Bruno's admonition to Arno not to speak about the Union follows directly after Arno related what he told the farmer about what might occur regarding the Respondent's drivers' delivery duties if the drivers were to become union members and appears directed solely to Arno's remarks to the Respondent's customers about the Union and its effect on the Respondent's business dealings. Arno's testimony that Bruno had ended his statement directing Arno not to talk to anyone about the Union with, ''You know nothing about our business,'' would support this con-

[112] *Advance Mining Group*, supra; *NLRB v. Security Guard Service*, supra.

[113] See generally *Long-Airdox Co.*, 277 NLRB 1157 (1988).

clusion. Moreover, Arno had never previously been told to refrain from talking about the Union to anyone including fellow employees, although Arno had spoken in favor of the Union to employees before the election occurred.

Under the circumstances present in this case I do not believe that the General Counsel has sustained his burden of showing that Bruno's statement to Arno concerning talking about the Union to ''anyone'' interfered with, restrained and coerced employees in the exercise of rights guaranteed in Section 7 of the Act or tended to do so, and I therefore would dismiss this allegation in the complaint.

The complaint also alleges that the Respondent violated Section 8(a)(1) of the Act when Bruno informed Arno that he had been fired because of Arno's activities on behalf of the Union during this same conversation. I find that Bruno's statement to Arno after Arno said that he was sick and tired of long hours and low wages, that ''Okay, that does it'' and Arno's discharge soon thereafter tended to interfere with, restrain, and coerce employees in the exercise of their rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

In a telephone conversation with dispatcher Terry Morehouse on April 19, 1991, Morehouse told Arno that he had ''ticked Bruno off'' by talking about ''the long hours and the wages . . . and the union.'' Later that same day when Arno picked up his final paycheck from Morehouse and asked Morehouse if he, Arno, had a ''bad attitude,'' Morehouse indicated that he did not. I credit Arno's rendition of their telephone conversation since Morehouse did not deny making the statements attributed to him above, and he did admit that he may have responded ''No'' when Arno asked him if he had a poor attitude.

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act when Morehouse informed Arno that he had been fired because of his activities on behalf of the Union. The evidence herein supports this allegation and I so find. Morehouse is an admitted supervisor and agent of the Respondent under Sections 2(11) and 2(13) respectively, of the Act.

The record evidence herein establishes that the Respondent was aware of Arno's prounion inclination and his activities on behalf of the Union at the time of his discharge on April 15, 1991. The timing of Arno's discharge, just days after he spoke to Bisnett Sr. about voting again for the Union, especially in view of the Union's objections to the election, and Morehouse's agreement that Arno did not have a poor attitude regarding his work undermines the Respondent's asserted reasons for Arno's discharge that of ''poor attitude'' including customer complaints, and supports the conclusion that these reasons, alleged by the Respondent, were pretextual. Moreover, the incidents mentioned by the Respondent as the basis of Arno's discharge were simply not serious enough to warrant his termination as acknowledged by Morehouse when he told Arno that both he and Bisnett Sr. felt that Arno's conduct merited a warning or talking too rather than a discharge.

Additionally, after the General Counsel met his burden of establishing a prima facie case that Arno's union activities was a motivating factor in Arno's discharge (knowledge of Arno's union activities, timing of the discharge proximate to the protected activities, and the Respondent's clear antiunion animus) and the pretextual nature of its asserted reasons for such discharge,[114] the Respondent then failed to sustain its burden of showing that Arno would have been terminated even in the absence of his union activities.[115] For example, the Respondent failed to offer proof that it had ever fired any employee prior to Arno for a ''bad attitude.''

From all the above, I find and conclude that the Respondent violated Section 8(a)(3) and (1) of the Act when it unlawfully terminated Vern Arno because of his union activities.

9. Additional violations alleged

The complaint also alleges that the Respondent terminated Robert Monroe and consolidated routes in order to redress grievances of its employees and in order to dissuade employees from engaging in activities on behalf of the Union in violation of Section 8(a)(1) of the Act. The Respondent denies this allegation.

The record evidence herein shows that Monroe was terminated by the Respondent under circumstances similar to those involved in the termination of Eugene Prashaw, which I previously found to be violative of the Act. Monroe commenced his employment as a truck driver in the Fall of 1989. In 1990 his fellow truckdrivers, Robert Perry and Michael Miller, started complaining to their supervisor, Tim Alplanalp, that they were required to complete Monroe's truck route on occasion because of Monroe's failure to do so. Perry and Miller also complained to Alplanalp about Monroe's failure to keep the garage clean. While Alplanalp said he would speak to Monroe about not performing his duties fully and also report this to Bruno, nothing was done regarding Monroe. In January 1991 the Union began its organizational campaign at the Respondent's facilities. On January 8, 1991, Monroe signed a union authorization card. In late February 1991, Perry and Miller again complained to management about having to complete Monroe's work without additional compensation. According to Bruno, being aware that there was a problem with Monroe and his fellow drivers about his work, Bruno went to the Ogdensburg facility to speak to Perry and Miller about this. Bruno testified that remembering what had been done regarding Eugene Prashaw he agreed to Perry and Miller's request to divide up Monroe's route among them which would result in additional hours of work and pay for them and the Respondent could terminate Monroe. Monroe was terminated on March 11, 1991, his letter of discharge giving as the reasons his failure to fully perform his duties and to keep the garage clean, and his unsafe driving habits. While Perry and Miller had complained about Monroe's work deficiencies previously on several occasions in 1990 it appears that no warning or discipline was given to Monroe regarding this.

The evidence herein, including the Respondent's knowledge of general union activity, the applicability of the small-plant doctrine,[116] the Respondent's demonstrated animus towards the Union, the timing of Monroe's discharge, and the pretextual nature of the reasons given by the Respondent

[114] *Fluor Daniel, Inc.*, supra.

[115] *Wright Line*, supra.

[116] It is obvious from the record evidence that the employees' union activities were carried out in such a manner and at such times that in the normal course of events, the Respondent must have known about them. See *Sogard Tool Co.*, supra.

therefore, sufficiently establishes a prima facie case against the Respondent with respect to the termination of Robert Monroe.[117]

Having found that the Respondent's alleged reasons for the termination of Robert Monroe were pretextual, I conclude that the Respondent has failed to meet its *Wright Line* burden of demonstrating that it would have taken the same action in the absence of Monroe's union affiliation.[118]

Based on the foregoing, I find and conclude that the Respondent violated Section 8(a)(1) of the Act when it terminated Robert Monroe and consolidated routes in order to redress grievances of its employees Perry and Miller and in order to dissuade them from engaging in activities on behalf of the Union.

V. OBJECTIONS TO THE ELECTION

The objections to the election herein are for the most part subsumed within the allegations of the complaint. Having found numerous instances of preelection Section 8(a)(1) and (3) misconduct on the part of the Respondent as set forth hereinbefore, the next issue to be decided is whether such violations are sufficient to warrant the setting aside of the election.

In *Clark Equipment Co*., 278 NLRB 498 (1986), the Board held that:

> [I]t is the Board's usual policy to direct a new election whenever an unfair labor practice occurs during the critical period since ''[c]onduct violative of Section 8(a)(1) is, *a fortiori*, conduct which interferes with the exercise of a free and untrammeled choice in an election.''[17] However, the Board has departed from the policy in cases where it is virtually impossible to conclude that the misconduct could have affected the election results. In determining whether misconduct could have affected the results of the election, we have considered ''the number of violations, their severity, the extent of discrimination, the size of the unit, and other relevant factors.[18]

[17] *Dal-Tex Optical Co*., 137 NLRB 1782, 1786 (1962).
[18] *Enola Super Thrift*, 233 NLRB 409 (1977).

In this case, many of the unfair labor practices found herein as violations of the Act and which includes those also alleged as objections to the election, occurred during the critical period between the filing of the petition in Case 3–RC–9695 on February 4, 1991, and the Board conducted election on April 5, 1991.[119] Other violations of the Act herein found occurred just prior to and in close proximity to the commencement of such critical period and during the advent of the Union's organizational campaign. These unlawful violations of the Act were numerous, involved violations of Section 8(a)(1) such as interrogation, solicitation of grievances, redress of such grievances through termination of employees, promises of wage increases and other benefits, solicitation of an employee petition against the Union, impression of surveillance of employees union activities, among others, and violations of Section 8(a)(3) of the Act such as the unlawful discharge of five employees who engaged in union activities and the imposition of more onerous working conditions on one of these employees before his termination. Moreover, the unfair labor practices were committed by two of the Respondent's owners who are also vice presidents, the Respondent's labor consultant, and various supervisors, and some of these violations involved most if not all of the Respondent's employees.

Since it is clear from the above that the Respondent's unlawful conduct was not de minimis, I conclude that such conduct has substantially interfered with the election. Since the standard for interference necessary to set aside a board-conducted election is substantial interference with ''laboratory conditions,'' I recommend that the Board set aside the election in Case 3–RC–9695, and that the Regional Director for Region 3 direct the holding of a second election at such time as he deems appropriate.[120]

VI. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of the Respondent, set forth in section IV, above, occurring in connection with the Respondent's operations described in section I, above, have a close and intimate relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

VII. THE REMEDY

Having found that the Respondent had engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom, and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent unlawfully terminated Eugene Prashaw, Verde Snyder, Richard Walrath, Mark Rood, Vern Arno, and Robert Monroe, the Respondent shall be ordered to offer them immediate reinstatement to their former positions, discharging if necessary any replacements hired since their terminations, and that they be made whole for any loss of earnings or other benefits by reason of the discrimination against them in accordance with the Board's decision in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest computed as in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[121]

Because of the nature of the unfair labor practices herein found, and in order to make effective the interdependent guarantees of Section 7 of the Act, I recommend that the Respondent be ordered to refrain from in any like or related manner abridging any of the rights guaranteed employees by Section 7 of the Act. The Respondent should also be required to post the customary notice.

[117] *BMD Sportswear Corp*., 283 NLRB 142 (1982); *NLRB v. Long Island Limousine Service Corp*., 468 F.2d 292 (2d Cir. 1972).
[118] *Flour Daniel, Inc*., supra; *Shattuck Denn Mining Corp*., supra.
[119] The only unfair labor practices found herein which occurred subsequent to the critical period were those which involved discriminatee Vern Arno.
[120] *Dal-Tex Optical Co*., supra. Also see *Jennie-O Foods*, 301 NLRB 305 (1991); *Pro-Tech Security Network*, 308 NLRB 655 (1992); *Casa Duramax, Inc*., 307 NLRB 213 (1992); *Sunbeam Corp*., 287 NLRB 996 (1988).
[121] See generally *Isis Plumbing Co*., 138 NLRB 716 (1962).

CONCLUSIONS OF LAW

1. The Respondent, Waste Stream Management, Inc. and its wholly owned subsidiary CBI Steel, Inc., is now and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Teamsters Local Union No. 687, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time employees including all truckdrivers, yard people, recyclers, mechanics, steel fabricators, equipment operators and plant clericals employed by Waste Stream Management, Inc. and its wholly owned subsidiary CBI Steel, Inc. at their facilities located at Potsdam, Canton, Gouverneur, Ogdesburg, and Parishville, New York. Excluding all office clerical employees and guards and supervisors as defined in the Act.

4. The Respondent, in violation of Section 8(a)(1) of the Act, has interfered with, restrained, and coerced its employees in the exercise of their rights under Section 7 of the Act by interrogating its employees concerning their union activities and the union activities of other employees, by soliciting grievances from its employees with explicit and implicit promises to rectify them, by suggesting to its employees that they could draw up a petition against the Union, by informing its employes that if the Union lost the election the Respondent would set up a grievance procedure, by soliciting its employees to sign a petition against the Union, by promising its employees various benefits including a grievance procedure in order to induce them to vote against the Union in the upcoming election, by creating the impression that it was keeping under surveillance the union activities of its employees, by promising and granting wage increases to its employees in order to dissuade them from supporting the Union, by terminating the employment of Eugene Prashaw and Robert Monroe and consolidating routes in order to redress grievances of its employees and dissuade them from engaging in activities on behalf of the Union, by telling an employee that he was being assigned more onerous working conditions becuse of his activities on behalf of the Union, by telling an employee that the Respondent was seeking a reason to terminate him becuse of his union activities and that this employee should forego such activities, by threatening to close its facilities because of the union activities of its employees, by informing an employee that he was being discharged because of his union activities, and by informing an employee that he was fired becuse of his union activities.

5. The Respondent engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act by imposing more onerous working conditions on employee Verde Snyder, and by discriminatorily terminating employees Eugene Prashaw, Verde Snyder, Richard Walrath, Mark Rood, and Vern Arno because these employees joined, supported, or assisted the Union and engaged in concerted activities for the purpose of collective bargaining or mutual aid or protection, and in order to discourage employees from engaging in such activities.

6. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

7. The Respondent has not otherwise violated the Act.

On the basis of these findings of fact and conclusions of law and on the entire record, I issue the following recommended[122]

ORDER

The Respondent, Waste Stream Management, Inc. and its wholly owned subsidiary CBI Steel, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees concerning their union activities and the union activities of other employees.

(b) Soliciting grievances from its employees with explicit and implicit promises to rectify them.

(c) Suggesting to its employees that they could draw up a petition against the Union and soliciting them to sign such a petition against the Union.

(d) Informing its employees that if the Union lost the election it would set up a grievance procedure.

(e) Promising its employees various benefits including a grievance procedure in order to induce them to vote against the Union in any upcoming election.

(f) Creating the impression that it was keeping under surveillance the union activities of its employees.

(g) Promising and granting wage increases to its employees in order to dissuade them from supporting the Union.

(h) Terminating employees and consolidating routes in order to redress grievances of its employees and dissuade them from engaging in activities on behalf of the Union.

(i) Telling employees that they are being assigned more onerous working conditions because of their union activities and that the Respondent is seeking a reason to terminate them because of their activities on behalf of the Union and that they should therefore forgo such activities.

(j) Threatening to close its facilities because of the union activities of its employees and if the Union came in.

(k) Informing employees that they are being fired because of their union activities and that they have been fired because of their activities on behalf of the Union.

(l) Imposing more onerous working conditions on its employees because they joined, supported, or assisted the Union and engaged in concerted activities for the purpose of collective bargaining or mutual aid or protection, and in order to discourage employees from engaging in such activities or other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

(m) Terminating employees or otherwise discriminating against them in regard to hire or tenure of employment or any term or condition thereof because they engage in union activities or in order to discourage union activities.

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[122] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(n) In any like or related manner interfering with, restraining, or coercing employes in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer to employes Eugene Prashaw, Verde Snyder, Richard Walrath, Mark Rood, Vern Arno, and Robert Monroe immediate and full reinstatement to their former jobs or, if these positions no longer exist, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision and expunge from the Respondent's personnel records any references to their terminations and notify each of them, in writing, that this has been done and that evidence thereof will not be used as a basis for any future personnel actions against them.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its facilities in Potsdam, Canton, Gouverneur, Ogdensburg, and Parishville, New York, copies of the attached notice marked ''Appendix.''[123] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarilay posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other materials.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that the election in Case 3–RC–9695 be set aside and that this case be severed and remanded to the Regional Director for Region 3 for the purpose of conducting a new election at such time as he deems the circumstances appropriate.

[123] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate our employees concerning their union activities and the union activities of other employees.

WE WILL NOT solicit grievances from our employees with explicit and implicit promises to rectify them.

WE WILL NOT suggest to our employees that they could draw up a petition against Teamsters Local Union No. 687, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO or any other labor organization and solicit them to sign such a petition.

WE WILL NOT inform our employees that if the Union lost the election we would set up a grievance procedure.

WE WILL NOT promise employees various benefits including a grievance procedure in order to induce them to vote against the Union in any upcoming election.

WE WILL NOT create the impression that we are keeping under surveillance the activities of our employees on behalf of the Union or any other labor organization.

WE WILL NOT promise and grant wage increases to our employees in order to dissuade them from supporting the Union.

WE WILL NOT terminate employees and consolidate routes in order to redress grievances of our employees and dissuade them from engaging in activities on behalf of the Union or any other labor organization.

WE WILL NOT tell our employees that they are being assigned more onerous working conditions or that we are seeking a reason to terminate them because of their activities on behalf of the Union or any other labor organization, and that they should forgo such activities.

WE WILL NOT threaten to close our facilities because of the union activities of our employees and if the Union came in.

WE WILL NOT inform our employees that they are being fired or were fired because of their union activities on behalf of the Union or any other labor organization.

WE WILL NOT impose more onerous working conditions on our employees because they joined, supported, or assisted the Union or any other labor organization, and engaged in concerted activities for the purpose of collective bargaining or mutual aid or protection, and in order to discourage employees from engaging in such activities or other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

WE WILL NOT terminate our employees or otherwise discriminate against them in regard to hire or tenure of employment or any term or condition thereof because they engage in activities on behalf of the Union or any other labor organization, or in order to discourage union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL make whole Eugene Prashaw, Verde Snyder, Richard Walrath, Mark Rood, Vern Arno, and Robert Monroe for any loss of earnings they may have suffered because of their terminations together with interest.

WE WILL remove from our personnel records any and all references to the terminations of the above-named employees, and WE WILL notify each of them, in writing, that this has been done, and that evidence thereof will not be used against them in any way.

WASTE STREAM MANAGEMENT, INC. AND ITS WHOLLY OWNED SUBSIDIARY CBI STEEL, INC.